**Case No. 18-1095**

# In the United States Court of Appeals
## For the Sixth Circuit

IN RE: SETTLEMENT FACILITY DOW CORNING TRUST

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES
*Interested Parties – Appellants*

v.

FINANCE COMMITTEE; CLAIMANTS' ADVISORY COMMITTEE
*Defendants – Appellees*.

**On Appeal from the United States District Court**
**for the Eastern District of Michigan**

# BRIEF OF APPELLANTS, THE DEBTOR'S REPRESENTATIVES AND DOW SILICONES CORPORATION

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# DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1095 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Deborah E. Greenspan, John J. Bursch

Pursuant to 6th Cir. R. 26.1, Dow Silicones Corporation
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.

See answer to No. 2.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

Dow Silicones Corporation is owned by The Dow Chemical Company, a wholly-owned subsidiary of DowDuPont, Inc., which is a publicly owned corporation. Further, various publicly-owned corporations may be creditors of Dow Silicone's Chapter 11 bankruptcy estate, but Dow Silicones believes their interests are too attenuated to present any conflict issues here.

CERTIFICATE OF SERVICE

I certify that on April 2, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Blank Rome LLP, 1825 Eye Street, NW
Washington, D.C. 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1095 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Deborah E. Greenspan, John J. Bursch

Pursuant to 6th Cir. R. 26.1, Debtor's Representatives
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. The Debtor's Representatives consist of: two who are counsel to Dow Silicones Corporation; one who is counsel to Corning Incorporated; and two who are employees of the Dow Chemical Company.

CERTIFICATE OF SERVICE

I certify that on April 2, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves payments out of a capped Settlement Fund. A first payment has already been made to many thousands of claimants.

The issue presented is whether a massive, second payment should be made to those same claimants on the assumption that only 3% of the additional 72,000 potential outstanding domestic claimants will file a claim for first payments before a June 3, 2019 filing deadline, when it is undisputed that if more than 17% (at the high end) of those potential claimants file a claim, there will be insufficient funds to make all first payments. In a previous decision, this Court held that no second payment could be approved unless first payments to all pending and future claimants are "virtually guaranteed." *In re Settlement Facility Dow Corning Trust*, 592 Fed. Appx. 473, 479–80 (6th Cir. 2015). Because that standard has not been satisfied here, this Court should reverse the approval of the second payments.

Oral argument is respectfully requested. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the Court in its decision. Oral argument is particularly important because the district court misapplied the law of the case established by this Court and applied an erroneous standard to authorize the distribution of payments, a ruling that jeopardizes payments to tens of thousands of potential future claimants.

## STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334. This Court has jurisdiction to review the district court's December 28, 2017 final order pursuant to 28 U.S.C. § 1291. *See* RE 1346. Appellants filed a timely notice of appeal on January 25, 2018. *See* RE 1360, Page ID #22036.

## STATEMENT OF THE ISSUES

In a previous appeal in this case, this Court held that no second payment from the Dow Corning breast implant capped Settlement Fund could be made unless it was "virtually guaranteed" that there are sufficient funds to make a first payment to all eligible present and future claimants. *In re Settlement Facility Dow Corning Trust*, 592 Fed. Appx. 473, 479–80 (6th Cir. 2015). The district court has now ordered a second payment assuming that only 3% of the approximately 72,000 outstanding potential domestic claimants will file a claim before a June 3, 2019 deadline, and that only 8% of 17,000 domestic claimants who have filed claim paperwork that is missing some information will remedy the defect. It is undisputed that if more than 17% of the potential domestic claimants timely file a claim, the Settlement Fund assets will be insufficient to make all first payments if all other assumptions applied by the Independent Assessor remain constant. That ruling raises three issues for this Court's resolution:

1. Whether the district court correctly applied the "virtual guarantee" legal standard.

2. Whether the district court further erred and failed to abide by the law of the case by interpreting the Plan language to require use of an assumption-based estimate with no analysis of confidence or risk as the basis for determining the sufficiency of funds to pay future claims if the second payments are made.

3. Whether the district court further erred and failed to abide by the law of the case by failing to consider expert evidence and based on that failure concluding that the alleged lack of such evidence provides a basis for allowing distribution of second payments.

## INTRODUCTION

This dispute arises out of a capped Settlement Fund created to pay plaintiffs who allege injury from Dow Corning breast implants. The settlement program is structured to make payments in two stages: a first payment to all eligible claimants who come forward by the applicable deadlines and, only if there are funds left over in the capped Settlement Fund, a second payment to those same claimants. This appeal is from the district court's approval of a massive second payment, even though there are at least 72,000 possible claimants who have not yet stepped forward and 17,000 others who have not yet finalized their claim for their first payment but may still do so before the deadline.

The settlement agreement provides that no second payments may be made unless the full payment of all first payments—pending and future—is "assured." This Court has previously held that this standard is satisfied only if the first-round payments to all pending and future claimants are "virtually guaranteed." *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 479–80 (6th Cir.2015). The district court believed that there were sufficient funds to authorize second payments now.

While it is theoretically possible that distribution of a second payment now will not harm future claimants, substantial uncertainty and risk exist such that it cannot be said that all future claimants are "virtually guaranteed" their first payment if the district court's distribution goes forward as planned. In fact, in ordering the distribution, the district court assumed that only 3% of the approximately 72,000 individuals classified as domestic claimants who *could* file a claim will actually do so by the deadline, and the district court failed to quantify either the likelihood that so few domestic claimants would file or the risk of non-payment to those 72,000 individuals if the second payments are made now.

Appellants Dow Silicones (formerly Dow Corning) and the Debtor's Representatives respectfully request that this Court reverse. Once the Settlement Facility-Dow Corning Trust ("SF-DCT") makes the second payments to tens of thousands of individual claimants, it is not realistic to expect those monies to be

returned to the fund. And if the settlement funds do run out, thousands of new claimants will be left with nothing while other claimants will have received the windfall of a second payment at the future claimants' expense.

## STATEMENT OF THE CASE

### A. Background

This Court has previously discussed the history of Dow Corning's bankruptcy proceedings and Amended Joint Plan of Reorganization ("Plan").[1] *See, e.g., In re Settlement Facility Dow Corning Trust,* 592 F. App'x 473 (6th Cir. 2015); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769 (6th Cir. 2010); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002*)*; *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996).

### B. Dow Corning's Amended Joint Plan of Reorganization: The Settlement Program

The Dow Corning bankruptcy was caused by one of the largest and most contentious mass tort controversies in history. Although scientific studies have demonstrated the lack of a causal connection between the implants and the alleged diseases, *see* Stuart Bondurant et al., *Safety of Silicone Breast Implants*, National Academy Press, 1999, at 7, 197, *available at* http://www.nap.edu/catalog.php?record_id=9602; *Silicone Gel Breast Implants*, Report of the Independent Review Group, July 1998, at 6, *available at* http://www.mhra.gov.uk/home/groups/dts-bi/documents/websiteresources/con

[1] Dow Corning Corporation changed its name to Dow Silicones Corporation effective February 1, 2018. *See* 6th Cir. RE 19. For the Court's and parties' convenience, Appellants will still refer to Dow Silicones as Dow Corning herein.

2032510.pdf, Dow Corning was forced to seek protection under Chapter 11 of the Bankruptcy Code due to the massive number of cases filed.

Dow Corning filed its Chapter 11 petition on May 15, 1995. Plan, RE 1279-3, Page ID #19850, § 1.126. In 1999, Dow Corning and the representatives of the tort claimants—the Tort Claimants' Committee—agreed to the Plan that provided a comprehensive settlement package for breast implant claimants. Following appeals, the Plan became effective on June 1, 2004. *See In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 475.

The Plan offers tort claimants the option of settling their claims through a Settlement Facility or litigating their claims against a Litigation Facility. Plan, RE 1279-3, Page ID #19865-68, §§ 5.4-5.4.2. The aggregate funding cap of $2.35 billion net present value is divided between two funds: a $400 million Litigation Fund is reserved for litigated claims and a $1.95 billion capped Settlement Fund reserved for claims that elect settlement. *Id.,* Page ID #19864-65, § 5.3; Settlement Facility and Fund Distribution Agreement ("Agreement"), RE 1279-1, Page ID #19692-93, §§ 3.02(a)(i)-(ii). (As used in the Plan, net present value is determined as of the Effective Date using a discount rate of 7% compounded annually. The defined term in the Plan is NPV. Plan, RE 1279-3, Page ID #19846, § 1.102.)

Breast Implant claimants who chose the settlement option may seek compensation for up to three types of claims: explant, rupture and either disease or

expedited release. Plan, RE 1279-3, Page ID #19866, § 5.4.1.1. The explant benefit provides a fixed payment that is to help cover the cost of removing a qualified breast implant. The rupture benefit is paid if the claimant's Dow Corning breast implant ruptured while implanted. The expedited release benefit provides a fixed payment to claimants who demonstrate implantation with a Dow Corning breast implant. The disease benefit—which is an alternative to the expedited release benefit—provides payment for claimants who demonstrate use of a Dow Corning breast implant and who submit medical records confirming that they have certain defined medical conditions. The claimants are *not* required to prove that these medical conditions were caused by their breast implants. *See generally* Agreement Annex A, Dow Corning Settlement Program and Claims Resolution Procedures ("Claims Resolution Procedures"), RE 1307-2, Page ID #20405-18, § 6.02.

The settlement program is structured to allow claimants to submit disease claims over a 16-year period. Individuals whose disease/qualified medical condition manifests *at any time* during that period can file a claim. Claims Resolution Procedures, RE 1307-2, Page ID #20450, § 7.09(b)(1). The premise of this lengthy program is that individuals will continue to manifest eligible medical conditions and will submit their claims when the eligible condition arises. The Plan prescribes fixed payment amounts in a settlement grid for each type of qualified medical condition so that claimants who develop qualifying medical conditions receive equal benefits,

no matter when they file a claim during the life of the settlement program. *Id*., Page ID #20408-13, § 6.02(d). Multiple provisions of the Agreement, such as this settlement grid, are intended to *"to assure equitable distributions* to Claimants within the aggregate limits of the Settlement Fund …" Agreement, RE 1279-1, Page ID #19718, §7.03(c)(i).

### C. The Agreement, payment priority and administration

The Agreement governs the liquidation, settlement and payment of claims within the limits of available Settlement Fund assets. Agreement, RE 1279-1, Page ID #19691, § 2.01. Section 7.01 establishes the categories of payment, the principles governing distribution of the Settlement Fund, and the priority and timing of payment. *Id*., Page ID #19712-14.

First Priority Payments are the "base" settlement values applied to specific claim types. *Id.*, Page ID #19712, § 7.01(a)(i). Second Priority Payments consist of certain additional payments that may be made only under certain conditions. Second Priority Payments are: (1) Premium Payments, which, as relevant here, equal 20% of the value of a disease claim and 25% of the value of a rupture claim; (2) Increased Severity Payments, which provide an additional payment for Settling Breast Implant Claimants whose condition worsens after they receive their "base" payment; and (3) Class 16 Payments, which are funds owed to Dow Chemical for settlement amounts paid before the Plan's Effective Date. *Id.*, Page ID #19712, § 7.01(a)(iii); Plan, RE

1279-3, Page ID #19887-88, §§ 6.16.5, 6.16.6. Premium Payments for Class 5 Breast Implant Claims (domestic claims) range between $2,000 and $50,000. Claims Resolution Procedures, RE 1307-2, Page ID #20411-12. Increased Severity Payments for Class 5 Breast Implant Claims range between $36,000 and $210,000. *Id.*, Page ID #20411-13.

As their names imply, and as the Agreement mandates, First Priority Payments have a higher priority than Second Priority Payments and Second Priority Payments are subordinate to First Priority Payments. Agreement, RE 1279-1, Page ID #19713, § 7.01(c)(i) ("All categories of payment are subject to reduction if necessary to assure payment in full of First Priority Payments (subject to the limits of the Settlement Fund and the Litigation Fund)."). In other words, Second Priority Payments function as additional or supplemental payments or reimbursements, payable only once First Priority Payments and all other higher priority claims have been assured.

The settlement program is administered by a Claims Administrator and a Finance Committee, of which the Claims Administrator is a member. Agreement, RE 1279-1, Page ID #19694-97, 19700-03, §§ 4.02, 4.08. The Plan provides for an "Independent Assessor" who is to assist the Finance Committee in analyzing the claim filings. *Id.*, Page ID #19699, § 4.05. The Independent Assessor is to issue quarterly reports compiling the claims data. *Id.*, Page ID #19713-14, § 7.01(d)(1).

The Plan authorizes the Finance Committee to distribute payments in installments if the filing data indicates that the Trust will not be able to pay all claims in full in any given year due to the annual funding caps that limit the amount of funds available in each year. *Id*., Page ID #19715, § 7.02(d).

The Plan authorizes the Finance Committee to make a recommendation to the district court seeking the distribution of Second Priority Payments. *Id*., Page ID #19717, § 7.03(a). Critically, Second Priority Payments may be distributed only if the district court 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 [First Priority] payment (along with administrative costs) based on the available assets." *Id*. (emphasis added). *See also id*., Page ID #19713, § 7.01(c)(iv).

**D. The District Court's previous decision and this Court's 2015 reversal**

In 2011, the Finance Committee filed a First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments ("2011 Motion"), which sought authorization to distribute Premium Payments – one category of Second Priority Payments. RE 814.

On December 31, 2013, the district court granted the 2011 Motion. In so doing, the district court found that the word "assure" was modified by the word "adequate" and therefore concluded that the "assurance" standard for authorizing

distribution of Second Priority Payments meant only that the payment of First Priority Payments be "more likely than not." *In re Settlement Facility Dow Corning Trust,* 2013 WL 6884990, at *6 (E.D. Mich. Dec. 31, 2013). The district court's construction of the Plan language was based in part on its view that the distribution of second payments was to be determined using an estimate of future claims. The district court stated that its "interpretation of the [Agreement] is that the Independent Assessor's analysis is sufficient documentation for the Court's review in determining whether to distribute Second Priority Payments." *Id*. at *8.

Both this Court and the district court denied Appellants' motions to stay distribution of the Second Priority Payments pending appeal. District Court Order Denying Motion to Stay Pending Appeal, RE 954; *In re Settlement Facility Dow Corning Trust*, 2014 WL 4824822 (6th Cir. Mar. 31, 2014). So, before this Court issued its decision on the merits, the SF-DCT had already distributed over $92 million in Premium Payments, one of the three categories of Second Priority Payments. These funds have not been and will never be recovered. *See* Report of Independent Assessor End of Second Quarter 2016 (Oct. 18, 2016) ("IA Report"), RE 1279-2, Page ID #19740.

This Court reversed and remanded, finding that the district court's construction of the relevant language was grammatically incorrect, that the word adequate does not modify the word assure, and that the relevant case law makes clear

that the word "assure," made in the context of future payments, means to "'*guarantee*[] *that those payments will be made*.'" *In re Settlement Facility Dow Corning Trust*, 592 F. App'x. 473, 479-80 (6th Cir. 2015) (citation omitted) (emphasis added). Accordingly, this Court determined that the Plan standard was more stringent than the "strong likelihood" or "more probable than not" levels of confidence that describe the "adequate assurance" standard applied by the district court, and that Second Priority Payments could not be distributed absent a "virtual guarantee" that all First Priority Payments would be made in full. *Id*.

**E. The Finance Committee's present motion**

The Finance Committee filed a new Recommendation and Motion for Authorization to Make Second Priority Payments ("2016 Motion") on December 30, 2016. RE 1279. The 2016 Motion states expressly that the Finance Committee was unable to determine how to apply the virtual guarantee standard and that it sought judicial clarification. *See id*., Page ID #19681. The 2016 Motion suggested two alternative interpretations of 'virtual guarantee': "beyond a reasonable doubt" and "beyond any reasonable possibility." *Id*., Page ID #19680-81. In support, the Finance Committee submitted a report prepared by the Independent Assessor. *See* Exh. B to 2016 Motion, IA Report, RE 1279-2. The 2016 Motion does not indicate that the Finance Committee provided any definition of virtual guarantee to the Independent Assessor.

Appellants opposed the 2016 Motion on the ground that neither the Finance Committee nor the IA Report demonstrates a "virtual guarantee" of first payments. RE 1287. The Claimants Advisory Committee ("CAC") supported the 2016 Motion. RE 1285. After a hearing before the district court, the Finance Committee filed a supplemental brief in support. RE 1316. Despite its initial uncertainty about the meaning of virtual guarantee, the Finance Committee's supplemental submission asserted that the IA Report provides a sufficient basis to meet this Court's standard based on yet another formulation of the standard. *Id*., Page ID #20982-83. The Finance Committee's supplemental submission did not adopt any clear definition of virtual guarantee but instead concluded that its task was to "reconcile" the Plan language with this Court's standard. Finance Committee Supp. Br., RE 1316, Page ID #20969.

**F. The Independent Assessor's report**

The Finance Committee's assertion—that there will be sufficient assets in the capped Settlement Fund to pay both pending and future first payments in full even if Second Priority Payments are distributed now—is based entirely on the Independent Assessor's estimates of the cost of paying pending claims that are still in process and the number and value of future first priority claims. As of the date of the 2016 Motion, there were approximately 72,000 domestic breast implant claimants eligible to file claims for First Priority Payments, and an additional 17,000

domestic breast implant claimants who had pending claims with a deficiency that may be cured by the submission of additional information. Reply Declaration of Paul Hinton ("Hinton Reply Dec."), RE 1308 at ¶¶ 23, 49 and Table 2.1 and Table 3 and at Exhibit 5 (this record entry is sealed); IA Report, RE 1279-2, Page ID #19749-50, #19768-72; Settlement Facility-Dow Corning Trust Claims Processing Report for the Period Ending June 30, 2016, RE 1288, at pp. 1-2 (this record entry is sealed). There are also additional *foreign* breast implant claimants who similarly remain eligible to file disease claims or to cure their previously filed claims. Hinton Reply Dec., RE 1308, at ¶¶ 27-31; IA Report, RE 1279-2, Page ID #19779-80.

No one knows how many of these 72,000 individuals will file claims, but no one disputed the analysis showing that the Settlement Fund assets are insufficient to pay more than 12 to 17 percent of these individuals. Hinton Reply Dec., RE 1308, at ¶¶ 49-50 and at Tables 2.1, 2.2 and 2.3. (The range of 12 to 17 percent is based simply on variation in the timing of claim filings and the severity of the conditions while maintaining all of the other assumptions applied by the Independent Assessor constant to illustrate the sensitivity of the calculation to simple changes. *Id.*) The percentage could be far lower. For example, if the assumed rates at which claimants cure deficiencies were to be increased, the number of new first priority filings that would consume the fund would be still lower.

The IA Report consists of a summary of historical claims data, an accounting of the history of claim filings and payments, some computations showing historical average claim values, a projection of future claim payments for pending claims already filed, and a projection of potential future claim filings and the estimated value of those projected future claims. The IA Report thus provides the actual value (both in nominal and net present value terms) of the claims already processed and paid.

To estimate the cost of future claim payments, the IA Report creates a computation that is based on 85 different assumptions about the timing and nature of future claim filings and the percentage of currently deficient claims that will be "cured" and become eligible for payment. Hinton Reply Dec. RE 1308, ¶ 4 and Table 1. The most significant assumption is that *less than 3%* of the approximately 72,000 eligible domestic breast implant claimants (the most costly class of claims) will file claims for their first payment during the then-remaining three years of the program. *See id*., ¶¶ 49-50. That assumption is based on a simple extrapolation of the filing rate experienced during a selected 18-month period in the past and assumes that the characteristics of the remaining population of 72,000 individuals are precisely the same as those of the population of 800 individuals who filed claims during that 18-month period. Hinton Reply Dec., RE 1308, Exh A, at Exh. 1 at ¶ 49; *see also id.* at ¶ 12b and attachment 31.23; IA Report, RE 1279-2, Page ID

#19732. Although scientific studies have demonstrated the lack of a causal connection between the implants and the alleged diseases, *see supra*, at 6, the estimate does not account for or discuss the prevalence or incidence of the eligible medical conditions among the population or any other demographic characteristics that might be pertinent to claim filings and that are typically incorporated into future claim projections. Declaration of Paul Hinton ("Hinton Dec."), RE 1287-2, Page ID #20117, at ¶ 18.

The projection also assumes that the dollar value of the projected claim filings will be the same as the dollar value of claims paid during the period 2013 through 2015. The calculation further assumes that only 2% of certain pending claims with deficient Proof of Manufacturer submissions (a necessary component for compensation) will cure their deficiencies. IA Report, RE 1279-2, Page ID #19731, 19776; Hinton Reply Dec., RE 1308, Exh. 5. The IA Report aggregates all the assumptions and then calculates the projected cost of the estimated future first priority claims. The IA Report then subtracts this projected cost of the estimated future first priority claims, plus the cost of the proposed second payments from the total remaining assets of the Settlement Fund. This arithmetic exercise shows a surplus of funds after all these estimated claims are paid.

The IA Report does not contain any quantification of risk of error, confidence, certainty or probability, and all of the experts agreed that it was not possible to quantify the risk or degree of uncertainty, risk of error, probability or confidence in the Independent Assessor's estimate. Hinton Dec., RE 1287-2, Page ID #20118-19, at ¶¶ 23-24; Hinton Reply Dec., RE 1308, Exh. A at Exhibit 4 ¶ 24 (the expert for the CAC opined that that "[i]t would be extremely difficult to aggregate these multiple computations to reach meaningful conclusions about a forecast's statistical reliability and utility."); *see also* RE 1323-2, Page ID #21379, Transcript at 37 (CAC's counsel acknowledging that the IA's methodology does not lend itself to a quantified error analysis).

The IA Report recites numerous caveats and warnings that its estimate could be wrong and that events and activities could easily change its calculations. IA Report, RE 1279-2, Page ID #19728 ("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"); *id.*, Page ID #19731 ("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.").

The IA Report concludes that if the assumptions applied prove to be correct—only 3% of the 72,000 eligible domestic breast implant claimants file new/future claims and only a small percentage of pending deficient claims are cured, then there should be sufficient funds to pay both the small *estimated* number of First Priority Payments as well as the Second Priority Payments proposed in the 2016 Motion.

### G. The District Court's decision

On December 27, 2017, the district court issued its decision granting the 2016 Motion and authorizing the distribution of 50% of Second Priority Payments ("Order"). RE 1346. The district court relied on and cited the estimates in the IA Report as the basis for concluding that "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." *Id*., Page ID #21588-89.

Appellants filed a timely notice of appeal and simultaneously filed a motion with the district court seeking a stay of the Order. *See* Notice of Appeal, RE 1360; Motion to Stay, RE 1361. The district court has not yet ruled on the motion to stay. The Finance Committee – the proponent of the Recommendation – supports the motion to stay, advising that "experience from the last distribution of premium payments counsels that a stay pending appeal is the most prudent course of action." RE 1377, Page ID #22524.

## SUMMARY OF ARGUMENT

The Agreement protects all claimants, ensuring they will receive at least a first payment by severely limiting the circumstances under which second payments may be issued from the capped Settlement Fund. Claimants can be secure in the knowledge that, even if they waited to file a claim, they will not lose the opportunity to receive compensation.

In the previous appeal, this Court described the conditions under which second payments could be distributed: only when there is a "virtual guarantee" that all first payments to prospective payments will be made, notwithstanding the second payments. And this Court's use of the phrase "virtual guarantee" is not obscure or ambiguous. Courts have consistently interpreted these words to mean that there is an effective guarantee, such that the risk of non-payment is near zero. In this case, that means a second payment is appropriate when there is a near-zero chance that the fund will run out of money before all prospective claimants receive at least their first payment.

The district court did *not* find such a near-zero risk but concluded that the second payments could be distributed anyway because the Finance Committee (the entity charged with responsibility for making a recommendation to the district court regarding distribution of second payments) showed an estimated surplus of funds

available for payment of estimated future first payments even after distribution of second payments. But that estimate (1) makes 85 assumptions, including that only 3% of the approximately 72,000 prospective domestic claimants will actually file a claim, and that only 2% of certain pending claims with deficient Proof of Manufacturer submission will be cured and that only 8% of 17,000 domestic claimants who have filed defective claims will correct them, and (2) contains no analysis of risk of error, level of confidence, probability, or certainty and does not take into account the prevalence of the qualified medical conditions in the population.

Although the district court incants the phrase "virtual guarantee" in its opinion, the opinion's reasoning makes clear that the district court misinterpreted and did not correctly apply this Court's legal standard. Instead, the district court's conclusion is based entirely on an assumption-based analysis. Contrary to the district court's assertion, the Agreement does not endorse or require such an analysis. To the contrary, the Agreement demands assurance and use of such an estimate without any reliable determination of the level of confidence is the exact opposite of a "virtual guarantee" that all prospective claimants will be compensated.

The district court also did not consider expert evidence that was provided, and thereby failed to follow the requirements of the Agreement and this Court's prior ruling. This Court's previous ruling makes clear that the district court is required to

consider expert evidence submitted in response to a recommendation to distribute second payments. The district court's decision cites the lack of certain expert evidence—which is in fact in the record—as a basis for concluding that the assumption based estimate is sufficient to allow distribution of second payments. The district court plainly did not review this evidence.

The effect of the district court's decision is to allow tens of millions of dollars of second payments to be distributed to individuals who have already received their first payment, at the expense of the individuals with future first payment claims whose rights are supposed to be protected by the Agreement's stringent second-payment standard. The district court's determination appears to be based on a belief that claimants have lost interest in the settlement program. But a mere belief is legally irrelevant in light of the governing standard, does not make sense in the context of a multi- year program designed to assure payment for future manifestation of disease and it is also dangerous to prospective claimants. If even 17% (rather than 3%) of domestic claimants file a claim, there will be insufficient funds to make all first payments if the second payments are distributed as authorized by the district court. Accordingly, this Court should reverse the district court's decision and remand for further proceedings.

## STANDARD OF REVIEW

This appeal involves the interpretation of unambiguous language in the Plan Documents, and this Court's prior decision. This Court has previously determined that the *de novo* standard applies on appeal when reviewing the district court's interpretation of Plan Documents. *See In re Settlement Facility Dow Corning Trust*, 59 F. App'x 473, 477-78 (6th Cir. 2015) (involving same Plan language relevant to present appeal); *Dow Corning Corp. v Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368, 372 (6th Cir. 2013) (involving the application of Time Value Credits to account for early payments under the Plan language); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust),* 628 F.3d 769, 771-72 (6th Cir. 2010) (involving the Plan's definition of tissue expanders and total disability).

In addition, in this case, this Court already interpreted the language of the Plan that sets forth the necessary standard. On appeal, when a district court applies the law of the case as determined by the appellate court, this Court should review the district court's interpretation *de novo*. The district court must "adhere to rulings of the appellate court issued earlier in the case." *United States v. Charles*, 843 F.3d 1142, 1145 (6th Cir. 2016); *Williams v. McLemore*, 247 F. App'x 1, 5 (6th Cir. 2007) ("Where an appellate court has determined an issue of law—either explicitly or implicitly—a lower court may not depart from that determination," unless one of

three "exceptionally narrow" exceptions apply); *see also Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 169 F. App'x 976, 986 (6th Cir. 2006) ("When a superior court determines the law of the case and issues its mandate, a lower court is not free to depart from it."). To the extent that this appeal involves the application of law to facts, the same *de novo* standard applies. *See Shan Dong Lin v. Holder*, 454 F. App'x 472, 474 (6th Cir. 2012) (when the issue is "application of legal principles to undisputed facts," this Court applies a *de novo* standard of review); *United States v. Phillips,* 516 F.3d 479, 483 (6th Cir. 2008) ("Because the district court's determination of 'relevant conduct' under the Sentencing Guidelines involves the application of law to fact, we review the district court's determination de novo.").

## ARGUMENT

### I. The District Court did not apply the "virtual guarantee" standard that this Court required in the previous appeal and its decision effectively modifies the standard.

#### A. This Court's prior ruling.

In *In re Settlement Facility Dow Corning Trust*, 592 F. App'x. 473 (6th Cir. 2015), this Court interpreted the Agreement provisions that provide that Second Priority Payments may only be distributed 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 . . . "

Agreement, RE 1279-1, Page ID #19717, § 7.03(a) (emphasis added); *see also id.*, Page ID #19713, § 7.01(c)(iv). In its earlier opinion, the district court interpreted "assure" to mean that the SFA requires only an "adequate assurance" of payment. *In re Settlement Facility Dow Corning Trust,* 592 F. App'x at 478.

In reversing the district court, this Court found no ambiguity in the Agreement and held that assure means "guarantee":

> Fortunately, [Agreement] § 7.03(a) makes the requisite level of adequacy clear: the provision must be so adequate as to "assure" future First Priority and Litigation Payments. . . . The New York case cited by the parties interpret the word "assure," made in the context of making future payments, to mean *guaranteeing* that those payments will be made. *Utils. Eng'g Inst. v. Kofod,* 185 Misc. 1035, 58 N.Y.S.2d 743, 744–745 (N.Y.Mun.Ct.1945) ("It is true that the dictionary gives different meanings to the word 'assure' depending on the way it is used. . . . In the way in which the word was used here [*i.e.*, to assure future payment], the word means 'guarantee' and all parties must have so understood it.")

*In re Settlement Facility Dow Corning Trust,* 592 F. App'x at 479 (emphasis added).

Accordingly, this Court "adopt[ed] the Appellant's terminology of 'virtual guarantee' to describe the required confidence standard under Agreement § 7.03(a)." *Id*. at 479-80. This Court concluded that it should not interpret "assure" to require an *absolute* guarantee, since to do so would render Agreement Section 7.03(a) superfluous. *Id*. So, assurance of payment does not require that all First Priority Payments actually be *made* before Second Priority Payments may be issued, but that their payment must be effectively—"virtually"—guaranteed.

**B. "Virtual guarantee" means near zero risk.**

As this Court explained it, "virtual guarantee" is a stringent standard, requiring more than "the 'strong likelihood' or 'more probable than not' levels of confidence that describe 'adequate assurance.'" 592 F. App'x at 480. 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." *Definition of Guarantee*, Oxforddictionaries.com, https://en.oxforddictionaries.com/definition/guarantee (last visited April 2, 2018). "Virtual" is defined as "being such in essence or effect though not formally recognized or admitted." *Definition of Virtual*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/virtual (last visited April 2, 2018). Thus, a virtual guarantee must be "in essence or effect" a guarantee.

Courts have consistently interpreted "virtual guarantee" to mean that the risk of error is nearly non-existent and that the intended outcome or undertaking has a negligible risk of non-occurrence. Appellants, the CAC and the Finance Committee all cited as instructive cases that describe virtual guarantee as a risk of error that approximates 1% probability. In the case described in the 2016 Motion as "helpful" (2016 Motion, RE #1279, Page ID #19679), *Marine Bank v. Weaver*, 455 U.S. 551 (1982) the Supreme 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. Rather, the Court explained, a CD is "virtually guaranteed" because deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"), *id* at 558, as demonstrated by an FDIC Report showing that in failed bank cases, 99.9% of depositors were assured of payment, while 99.8% of total deposits (i.e., those above the legal limit) were paid or made available. *See id*.; *1980 Annual Report of the Federal Deposit Insurance Corporation*, at 20 (1981); https://goo.gl/rP6V77.

In *In re CM Holdings, Inc.*, 254 B.R. 578, 614-16 (D. Del. 2000), cited by the CAC as an "instructive" case, the IRS argued that a company attempted to circumvent a legal bar on guaranteeing life insurance dividends by seeking to "virtually guarantee" their payment. The IRS succeeded in demonstrating a virtual guarantee based on dividend performance within 1.13% of projections. *See* Response of CAC to 2016 Motion, RE 1285, Page ID #20011 (agreeing that 98-99% certainty of payment constituting a virtual guarantee, as reflected in *CM Holdings,* "is an appropriate level of certainty to constitute a 'virtual guarantee'"). *See also Chinery v. Metropolitan Life Ins. Co.*, 182 N.Y.S. 555, 557-58 (2d Dep't 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."); *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D.

355, 360 (E.D.N.Y. 1982) (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) (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"); *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).

Where risk cannot be determined at such a near-zero level, there is no "virtual guarantee." *See Uselton v. Commercial Lovelace Motor Freight, Inc.,* 940 F.2d 564, 582 (10th Cir. 1991) (citing *Marine Bank, supra,* and holding that Secretary of Labor's power to enforce ERISA's obligations does not meet standard of "essentially guarantee[ing]" ESOP investments "because the value of these investments is entirely dependent on the value of the employer company's stock, and hence on the financial soundness and future prospects of the employer itself, rather than on the employer's continued funding and proper management of plan assets. Accordingly, the Secretary's monitoring and corrective authority under ERISA does

not provide 'the 'virtual guarantee' necessary to displace the protection of the securities laws' and its disclosure provisions.'") (citation omitted).

### C. The District Court erroneously interpreted the virtual guarantee standard to be satisfied in the absence of any analysis of the level of confidence or certainty of the estimate.

To establish a virtual guarantee, the district court needed to find a near-zero risk to payment in full of all present and future First Priority Payments. As an initial matter, before finding such a near-zero risk, the district court required a credible basis upon which to determine with assurance the cost of paying the remaining First Priority Claims. The district court had no such credible basis.

The district court found that there is a "virtual guarantee" of payment of all pending and future First Priority Payments solely because the IA Report shows excess funds remaining after payment of an *estimated* number of future first and second priority claims: Specifically the Independent Assessor estimated that only 3% of 72,000 potentially eligible domestic claimants would file in the future, that only 2% of older pending Proof of Manufacturer claims and only 8% of 17,000 deficient domestic claims would be cured. Hinton Reply Dec., RE 1308 at ¶ 23; IA Report, RE 1279-2, Page ID # 19767-72. The IA Report contains no analysis of "confidence." *See supra*, at 18-19. An estimate, without a credible and reliable analysis of confidence, certainty or risk is nothing more than a rough approximation. *See* http://www.businessdictionary.com/definition/estimate.html ("An estimate is

almost the same as an educated guess, and the cheapest (and least accurate) type of modeling."). A guess, even a really good one, cannot constitute a "virtual guarantee."

The district court discounted the lack of such confidence analysis because it would not be possible to show that each of the dozens of assumptions in the Independent Assessor estimate could be guaranteed. Order, RE 1346, Page ID #21588. But as this Court recognized in the first appeal, "confidence [is] a relevant issue," and the degree of confidence required here is that of negligible risk. *In re Settlement Facility Dow Corning Trust,* 592 F. App'x at 480. If it is too difficult to determine confidence, then *a fortiori*, there is no way to asses any level of risk much less find the negligible risk required by the virtual guarantee legal standard.

The caveats and limitations in the IA Report underscore the reason for the Agreement's stringent standard. The Independent Assessor cannot provide a probability analysis or level of confidence for even one of the 85 assumptions upon which the calculation is based. *See supra*, at 18-19. The Independent Assessor calculates a surplus but then expressly advises that it could be wrong and that future events could result in changes to the assumptions. *See supra*, at 19; IA Report, RE 1279-2, Page ID #19731 ("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."). Notably, at the time it authorized the distribution of Second Priority Payments, the district court separately authorized the distribution of notice to all claimants of the impending claim filing deadline. *See* Stipulation and Order Approving Notice of Closing and Final Deadline for Claims, RE 1342. This extensive notice program was not in place at the time of the IA Report.

It is undisputed that a surge of claim filings at the final claims deadline for a mass settlement like this one is a common and well-established phenomenon. IA Report, RE 1279-2, at Page ID #19757; Hinton Reply Dec., RE 1308, at p.15; CAC Response to the 2016 Motion, RE 1285-10, Exh. 9 (Declaration of Mark Peterson) (filed under seal), at 9 ("'surges' are common in filings with mass tort claims facilities like SF-DCT and in mass tort bankruptcy cases. They correspond with and are produced by facility or court events that disrupt otherwise stable claim filings. Intrusive and disruptive events include … claim filing deadlines in mass tort trusts, and outreaches by courts or facilities to notify of deadlines and to urge claimants to file now or never."). No one can know how many claimants will elect to file at the final deadline. Even in situations that do not involve ongoing manifestation of qualified conditions and thus ongoing filings, many claimants wait to file until at or near the final deadline, and such filing surges often represent a significant percentage of total filings. Hinton Reply Dec, Re 1308 at p. 15 and at Exh 1, at ¶¶ 76, 78

(describing how almost half the total number of claims filed for compensation from the September 11th Victim Compensation Fund of 2001 were filed on December 22, 2003, the eligibility deadline, and how publicity of the filing deadline and court's extension of the deadline in the Agent Orange Veteran Payment Program resulted in "an enormous increase in claim filings"); *see also* Kenneth R. Feinberg, The September 11th Victim Compensation Fund, 32 No. 2 Litigation 14, at 16 (Winter 2006), RE 1323-5, Page ID #21490 ("one interesting aspect of the program—familiar to many class action litigators—is how the filing rate for the Fund increased as the [deadline] approached. … [A]bout half of all participants filed with the program during the last 60 days").

In addition, the IA Report does not include an analysis of or even any information about the incidence or prevalence of the eligible conditions in the population in its computations. *See* Hinton Dec., RE 1287-2, Page ID #20117; 2016 Motion Supp. Br., RE 1316, at Page ID #20977. That is, the IA Report makes no attempt to consider how many of the 72,000 individuals have developed or could develop a compensable condition during the remainder of the program. The incidence and prevalence of the compensable conditions in the population are highly relevant and ordinarily are critical factors in causing claimants to file claims. Hinton Reply Dec., RE 1308, at ¶ 34. It is undisputed that the eligible conditions are

common in the general population and thus would be common in the claimant population. *See* Hinton Reply Dec., RE 1308, at ¶¶ 34-37.

In sum, the IA Report's estimate of future claims—and thus the calculated amount of excess funds upon which the district court relied—is nothing more than an illustration of the result *if* all of its 85 assumptions prove to be correct. The district court's conclusion is thus based on a *possible* "surplus" that would result *if* all the assumptions that comprise the *estimate* prove to be correct. This can hardly qualify as a virtual guarantee. If the assumptions are wrong, then the conclusions are wrong.

The situation here is similar to that faced by the Trustees for the A.H. Robins Bankruptcy Plan ("Robins Plan"), which resolved claims for injuries related to the Dalkon Shield intrauterine contraceptive device. *See A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986). The Robins Plan required the Trustees "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." 2017 Declaration of Georgene Vairo ("2017 Vairo Dec."), RE 1287-4, Page ID #20138-41. This language is strikingly similar to and effectively the same as the "assure" language in Section 7.03(a). The principal Dalkon Shield Trustee confirms that the Trustees would not have concluded that the funds in the Trust were sufficient to meet this standard

> based on an estimate of unknown future claims such as the estimate contained in the 2016 IA Report. Such an estimate would not have

> provided the Trustees with an appropriate and necessary level of support to allow the Trustees to begin the distribution of pro rata payments without jeopardizing the standard that all claims would be "paid in the same proportions" and "to ensure equality in distribution." While the 2016 IA Report estimates that there could be a surplus of funds, that estimate is based on a number of assumptions – each of which would not have been adequate to assure the Trustees that sufficient funds would be available to pay the claims of all eligible claimants. The Trustees would not have relied on such an assumption-based calculation because it creates significant risk that eligible claimants will not receive higher-priority amounts due them under the Plan if any lower-priority payments were authorized, as proposed in the 2016 Recommendation.

*See id*. (citation omitted).

Here, the district court did not determine—and could not determine, based on the undisputed record—that the risk to First Priority Payments is "near zero" if the second payments are made. And without such a finding based on credible evidence, there is no virtual guarantee that the first payments will be made. That is precisely what the Agreement and this Court's previous ruling were intended to prevent. The Second Priority Payments, therefore, may not be distributed.

**D. The District Court erroneously interpreted the Agreement to require reliance on an estimate to demonstrate assurance contrary to the plain language of the Plan and this Court's prior decision.**

The district court justified its conclusion by stating that the parties had "agreed" to rely on the type of assumption-based projection of future claims in the IA Report to support distribution of Second Priority Payments. Order, RE 1346, Page ID #21585, 21587. But there is no such agreement, and the district court's

attempt to fashion one amounts to a re-interpretation of this Court's previous decision.

All of the agreements among the parties are embodied in the Plan and the Plan Documents. The only provision in the Agreement that addresses future claim "projections" is § 7.01(d)(i). That section addresses the preparation of quarterly reports that provide contemporaneous information about the status of claim resolutions and track the amounts required to pay the eligible claims against the annual funding caps. Section 7.01(d)(i) lists the elements of these quarterly reports, including projections of the "likely" amounts required to pay pending "and projected future" First Priority Payments. Agreement, RE 1279-1, Page ID #19713-14.[2] There is no description of any "agreed" methodology, and there is no language that even suggests that the IA Report – regardless of content – must be deemed sufficient for purposes of Section 7.03(a).

Nor could there be such a requirement: § 7.01(d)(i)'s language, which refers to the "likely" amount of funds, is inconsistent with this Court's interpretation of § 7.03(a) – which requires assurance of payment. Section 7.01(d)(i) may not be read

[2] Section 7.03(c)(i), for example, provides that "the projections described at Section 7.01(d)" are to be used to determine if a *reduction* or *deferment* in the Allowed Amounts of First Priority Payments is required in the event that it appeared there would be insufficient funds to ensure equitable distribution of such payments to Claimants within the aggregate limit of the Settlement Fund. Agreement, RE 1279-1, Page ID #19718. Section 7.03(c)(i) does not include an "assure" standard.

to qualify the meaning of "assure" by mandating acceptance of a specified methodology regardless of its attributes, because to do so would render Section 7.03(a) meaningless – contrary to well settled rules of contract interpretation and the prior decision of this Court.

In interpreting a confirmed plan, courts apply basic contract principles. *In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). State law governs those interpretations, and a plan must be enforced as written. *Id.* The relevant documents are governed by New York law. Plan, RE 1279-3, Page ID #19885, § 6.13; Agreement, RE #1279-1, Page ID #19723, § 10.07. "In interpreting a contract under New York law, 'words and phrases…should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions.'" *Process Am., Inc. v. Cynergy Holdings, LLC*, 839 F.3d 125, 133 (2d Cir. 2016) (quotation omitted). While the district court must consider the information in the IA Report, the IA Report cannot support distribution of the Second Priority Payments unless it provides the type of confidence analysis that qualifies as a "virtual guarantee."

Section 7.01(d)(i) also cannot be read to import into § 7.03(a) a requirement to include a future claim projection. Section 7.03(a) does not mention a projection of future claims. It requires only submission of a calculation of the projected value of *pending* claims. (The Finance Committee recommendation must "be

accompanied by a detailed accounting of the status of Claims payments and distributions . . . 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)." Agreement, RE 1279-1, Page ID #19717, § 7.03(a) (emphasis added).) The omission of any reference to future claim projections in Section 7.03(a) must be deemed intentional and the district court cannot import language from another section to rewrite the provision. *Bank of New York Mellon Trust Co., N.A. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 310 (2d Cir. 2016) ("where condition included in one provision is omitted from another, it 'must be assumed to have been intentional under accepted canons of contract construction'") (quotation omitted).

The omission of such future projection language is no accident: there is no dispute that such future claim forecasts (like that of the Independent Assessor) have not been accepted "for the purpose of determining whether the payment of certain yet to be filed claims is 'assured' or 'virtually guaranteed.'" Hinton Dec., RE 1287-2, Page #20115-16 at ¶¶ 9-11. Courts have consistently 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 Armstrong World Indus., Inc.,* 348 B.R. 111, 114-15 (D. Del. 2006) (projection of liability is "an uncertain number" and "the number of possible variables makes any pretense to certainty illusory."); *Owens Corning v. Credit*

*Suisse First Boston*, 322 B.R. 719, 721 (D. Del. 2005) ("[r]elatively minor variations in underlying assumptions can skew the end result enormously."); *In re Federal-Mogul Global, Inc.*, 330 B.R. 133, 155 (D. Del. 2005). Section 7.01, therefore, cannot be read to qualify or affect the plain meaning of Section 7.03. If the parties had intended to distribute second payments at a particular point in time during the operation of the settlement program, or if the parties had intended to rely on estimates of claims regardless of the number of outstanding potential first payment claims, they could have so provided. Instead, the Plan adopts the assurance standard – which accounts for any possible claim submission scenario and different claimant behavior. If, for example, a high percentage of individuals had opted to "cash out" their claims using the expedited release option, then (depending on the numbers of course) it might have been possible to determine a maximum value of remaining claims that would provide the requisite assurance. But that has not happened.

The district court turned to extrinsic information to support its conclusion that the parties had agreed to accept an assumption-based projection of future claims as "assurance." The district court cites alleged "disclosures" made to claimants during the voting process (when creditors voted on the proposed Plan) and an illustrative chart that was presented during cross examination of an expert during the Plan confirmation hearing in 1999. *See* Order, RE 1346, Page ID #21585-87. To begin, this extrinsic evidence is not even factually correct. The disclosure statement did

not contain any "promise" as to when—or even if—Second Priority Payments would be made; rather it clearly stated: "Premium payments can be deferred and will not be paid unless all First Priority Payments are assured." Disclosure Statement, RE 1307-3, Page ID #20612. *See also id.*, Page ID #20596. The chart that the district court referenced was a simple illustration of one possible distribution scenario and nothing more. It did not and was not intended to set a specific point in time for the distribution of Second Priority Payments. *See* Hinton Reply Dec., RE 1308, at Exh A, at Exh. 1 at ¶¶ 83-85.

More important, the district court's use of extrinsic evidence—the same evidence that the CAC cited to this Court in the first appeal in support of its argument for application of a lower standard (Br. of Appellee Claimants' Advisory Committee, *In re Settlement Facility Dow Corning Trust*, No. 14-1090, 2014 WL 2555712, at *48-50 (6th Cir. May 27, 2014)), which this Court rejected—seeks to "re-interpret" § 7.03(a) in violation of this Court's previous decision and is improper. *See Waste Mgmt. of Ohio, Inc. v. City of Dayton,* 169 F. App'x 976, 985 (6th Cir. 2006) ("'when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal.'") (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995)); *see also Goldberg v. Maloney,* 692 F.3d 534, 538 (6th Cir. 2012) (same).

The district court's language suggests a lesser standard than the "virtual guarantee" standard established as law of the case. The district court's current opinion uses the phrase "adequately assured" (RE 1346, Page ID #21586), which is the same formulation that the district court adopted in its prior decision *before* the previous appeal, in which it incorrectly equated "assure" to require only a showing of "more probable than not" or at most a "strong likelihood." *In re Settlement Facility Dow Corning Trust,* 592 F. App'x at 478; *In re Settlement Facility Dow Corning Trust,* 2013 WL 6884990, at *6-7 (E.D. Mich. Dec. 31, 2013), *rev'd in part,* 592 F. App'x 473 (6th Cir. 2015). That formulation is ungrammatical and unfaithful to the Agreement and this Court's previous decision.

### E. The District Court erroneously interpreted the Plan and this Court's standard to find assurance based on the alleged lack of expert evidence and an alternative estimation of future claims.

The district court justified its failure to find a near-zero risk to First Priority Payments by shifting the burden to Dow Corning—as the entity objecting to the distribution of Second Priority Payments—to demonstrate an alternative methodology (apparently for predicting future claims). *See* Order, RE 1346, Page ID #21587-88. But the Plan requires an affirmative finding that there is a virtual guarantee that future First Priority Payments will be made in full, whether or not there are any objections. It does not allow distribution of second-round payments on the ground that objectors have not presented an alternative methodology.

Agreement, RE 1279-1, Page ID #19717, § 7.03(a). The lack of an alternative "methodology" for predicting future claims does not transform the Independent Assessor's estimate into a virtual guarantee. *Grossman v. Rankin*, 43 N.Y.2d 493, 502 (1977) ("burden is on party asserting the affirmative of an issue"). *Accord*, *e.g.*, *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 428 (2d Cir. 1999). ("In general, the law places the burden of proof on the party that asserts a contention and seeks to benefit from it"); *Acker v. Shulte*, 74 F. Supp. 683, 689 (S.D.N.Y. 1947) ("[A] person who seeks to enforce a claimed right has the burden of showing that he is entitled to it, no matter how difficult it may be; the burden is not upon the person who opposes the right to show that the other is not entitled to it.").

The district court sought to support its finding by stating that Dow Corning had not provided certain analyses or evidence, suggesting that the failure to provide certain expert evidence or alternative analysis means that the Independent Assessor's estimate is somehow "correct." Even if this were a logical basis upon which to rule, the district court is factually incorrect. Contrary to the admonition of this Court, the district court did not consider the relevant expert evidence that was provided.

First, the district court erroneously found that "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)." Order, RE 1346, at

Page ID #21585. To the contrary, Dow Corning's expert provided examples of scenario analyses demonstrating that the $100.4 million NPV "cushion" would be eliminated if the filing rate was 12-17% instead of the assumed 3%. *See supra*, at 16-17; Hinton Reply Dec., RE 1308, at ¶¶ 49-50 and at Tables 2.1, 2.2 and 2.3. Second, the district court erroneously stated "Dow Corning's experts do not criticize the Independent Assessor's application of its methodology." Order, RE 1346, Page ID #21586. To the contrary, Dow Corning's expert established that the methodology does nothing to quantify the risk, that the methodology has never been applied to support a standard of "virtual guarantee," and that application of methodology here does not meet such a standard. *See supra.*, at 18-19; Hinton Dec., RE 1287-2, Page ID #20115, 20118-19, ¶¶ 9, 23-24. Third, the district court erroneously stated "Dow Corning does not submit any expert testimony" analyzing the MDL-926 RSP. Order, RE 1346, Page ID #21586. To the contrary, Dow Corning and its expert addressed the MDL-926 RSP in detail and demonstrated that the filing experience there does not support the conclusions here. *See* Hinton Reply Dec., RE 1308, at ¶14 and at Exhibit 2, at ¶¶ 5-10. Fourth, the district court erroneously stated that Dow Corning had not submitted any expert testimony that the claim filing trend will somehow dramatically change course. Order, RE 1346, Page ID #21588. To the contrary, Dow Corning's expert provided evidence that claim filings typically surge

at filing deadlines. *See supra*, at 31. In fact, there is no dispute on this point: All agree that the claim filings *will* reverse course.

The district court's statements demonstrate that it did not consider the expert evidence as required by the Agreement and this Court. This failure alone requires reversal. The district court's reliance on the alleged lack of such evidence, that plainly exists in the record, further demonstrates its erroneous interpretation and application of the assure standard.

## CONCLUSION

The district court's decision boils down to a belief that 97% of the remaining claimants simply will not bother to file claims, and that thousands of the claimants who have not yet been paid because of defective filings will do nothing to fix their claims. The CAC endorsed this conclusion, stating, without citing any affirmative evidence, that claimants have "lost interest" in the settlement program. CAC Reply, RE 1305, Page ID #20313. But the contention that claimants have "lost interest" belies the very premise of the long term program, and if even only 17% (or less) of the remaining potential domestic claimants come forward with a claim, the capped Settlement Fund—assuming distribution of the second payments the district court has authorized—will be insufficient to make first payments to all the new claimants. That is hardly a "virtual guarantee" of payment as the Agreement and this Court's

previous decision require. Accordingly, Appellants respectfully request that the Court reverse and vacate the Order.

Dated: April 2, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), this brief contains 10,209 words.

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## CERTIFICATE OF SERVICE

I certify that on April 2, 2018, I electronically filed a copy of the foregoing Brief of Appellants, the Debtor's Representatives and Dow Silicones Corporation, through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case, as follows:

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**ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET**

| RE # | DESCRIPTION | PAGE ID # |
|---|---|---|
| 814 | Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments | 12350-12367 |
| 814-4 | Exhibit C – Funding Payment Agreement | 12414-12471 |
| 826-7 | Declaration of Georgene M. Vairo | 13426-13441 |
| 954 | Order Denying Motion to Stay Pending Appeal | 15928-15934 |
| 1279 | Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments | 19674-19683 |
| 1279-1 | Exhibit A – Settlement Facility and Fund Distribution Agreement | 19684-19724 |
| 1279-2 | Exhibit B – Report of Independent Assessor | 19725-19816 |
| 1279-3 | Exhibit C – Amended Joint Plan of Reorganization | 19817-19924 |
| 1285 | Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make 50% Second Priority Payments | 19996-20016 |
| 1285-10 | Declaration of Mark Peterson | SEALED |
| 1287 | 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 | 20081-20109 |
| 1287-2 | Exhibit C – Declaration of Paul J. Hinton | 20111-20126 |
| 1287-4 | Exhibit E – Declaration of Georgene M. Vairo | 20137-20153 |
| 1288 | Settlement Facility-Dow Corning Trust Claims Processing Report for the Period Ending June 30, 2016 | SEALED |
| 1305 | Reply of Claimants' Advisory Committee in Further Support of Finance Committee's Recommendation and Motion for Authorization to Make 50% Second Priority Payments | 20303-20319 |
| 1307 | Reply of Dow Corning Corporation and the Debtor's Representatives to the Response of the | 20369-20387 |

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|---|---|---|
| | Claimants' Advisory Committee to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments | |
| 1307-2 | Exhibit B – Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to Settlement Facility and Fund Distribution Agreement | 20389-20506 |
| 1307-3 | Exhibit D – Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization | 20507-20631 |
| 1308 | Reply Declaration of Paul Hinton | SEALED |
| 1316 | Supplemental Brief to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments | 20960-20985 |
| 1323-2 | Exhibit A – March 23, 2017 Hearing Transcript Excerpts | 21370-21379 |
| 1323-5 | Exhibit D – Kenneth R. Feinberg, The September 11th Victim Compensation Fund, 32 No. 2 Litigation 14, at 16 (Winter 2006) | 21488-21491 |
| 1342 | Stipulation and Order Approving Notice of Closing and Final Deadline for Claims | 21544-21551 |
| 1346 | Memorandum Opinion and Order Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments | 21562-21589 |
| 1360 | Dow Corning Corporation's and Debtor's Representatives' Notice of Appeal to the Sixth Circuit | 22036-22038 |
| 1361 | Dow Corning Corporation's and Debtor's Representatives' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments Pending Appeal | 22068-22069 |
| 1377 | Finance Committee's Response to Dow Corning Corporation and the Debtor's Representatives' Motion to Stay Distribution of Second Priority Payments | 22523-22525 |
| **RE #** | **DESCRIPTION** | **PAGE ID #** |