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,

Interested Parties - Appellees.

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

BRIEF OF APPELLEE CLAIMANTS' ADVISORY COMMITTEE

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STATEMENT OF CORPORATE
AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is 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 making.

INTRODUCTION[1]

To obtain support for its reorganization plan (the "Plan") in 1999 – which allowed it to exit bankruptcy and resume profitable operations – Dow Corning offered thousands of injured women rupture payments of $25,000 and disease payments of up to $300,000, a portion of which were designated as Premium Payments (or "Premiums") that would be delayed for a few years until adequate funding could be confirmed. Dow Corning also agreed to the process for determining when such adequate funding exists: The neutral Independent Assessor ("IA")[2] prepares annual projections based on an analysis of past claim payment history; the Finance Committee determines, based on these projections, when to recommend to the District Court that Second Priority Payments (including Premiums) be issued; and the District Court confirms, based on that recommendation and other input from the parties, when adequate funding has been demonstrated to pay Second Priority claims while assuring payment of all remaining base claims.

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[1] Abbreviated terms not defined herein have the meanings assigned to them in the Dow Corning Plan Documents and/or Appellants' opening brief ("App. Br."). For convenience, Appellants are referred to herein as "Dow Corning."

[2] Ankura Consulting, which serves as the IA, is the successor to ARPC, founded by B. Thomas Florence, a nationally known expert in mass tort claim forecasting who continues to serve as a Senior Managing Director and supervise the IA's work for the Dow Corning settlement.

The two fiduciaries charged with balancing the interests of current and future claimants – the Finance Committee and the CAC – concluded *in 2011* that adequate funding existed to pay all future First Priority Payments, plus (acting cautiously) a 50% installment of accrued and future Premiums. Dow Corning has resisted this conclusion every step of the way – acting not to protect the few claimants still seeking base payments near the end of this sixteen-year settlement program, but only to delay, and possibly avoid, having to fund further payments.

The District Court found a reasonable assurance of adequate funding and ordered payment of 50% Premiums in 2013. This Court reversed, holding that funding adequacy must be determined by a higher "virtual guarantee" standard but confirming that this could be supported, as specified in the Plan, by assumption-based projections that do not eliminate all uncertainty. On remand, based on five more years of claims experience demonstrating a huge and growing funding cushion (even after most of the 50% Premiums were paid pending appeal), the Finance Committee renewed its recommendation, and in December 2017 the District Court authorized the balance of the 50% Premiums as well as 50% of other categories of Second Priority Payments.

On appeal, it cannot seriously be disputed that adequate funding is virtually guaranteed. The IA applied a methodology that is specifically required by the Plan and, in any event, is the only one available for projecting claims within a

closed universe of registered claimants. It has proven exceptionally reliable over the course of this nearly concluded settlement program, consistently *over*-estimating the Trust's liability, and the IA continues to base its projections on a series of conservative assumptions. The 2016 IA Final Report projected a funding surplus, after payment of all base claims and 50% of Second Priority claims, of $100.4 million Net Present Value (NPV). This represents more than *$300 million* in cash (based on the Plan's 7% discount rate) – many times the amount needed to absorb any final claim surge at the end of this settlement. Given the IA's conservative approach, the actual cushion is no doubt much larger.

Dow Corning has never identified a plausible scenario under which this immense cushion could prove insufficient. It merely incants, repeatedly, that the cap would be exceeded if a certain percentage of the residual pool of potential claimants suddenly surfaced with allowable claims. But this is only math. The 10,000 claims required to satisfy Dow Corning's black swan scenario is nearly *six times* the most conservative projection of remaining claims – requiring a bizarre and unexplained outpouring of claims from thousands of people who filed proofs of claim in the 1990s and have taken no action or even communicated with the SF-DCT since then. It may not be *mathematically* impossible for this to happen, but it is as close to that as can be without simply waiting until the end of the settlement – which would eliminate *all* uncertainty, but violate the agreements embodied in the

Plan and this Court's prior holding that absolute certainty is not required. Dow Corning's suggestions that it is merely "theoretically possible" that payment of Premiums will not harm claimants and that "substantial uncertainty and risk exist" (App. Br. 4) are pure rhetoric.

Lacking any good faith basis to argue that the District Court's finding of adequate funding is clearly erroneous, Dow Corning labors mightily – and unsuccessfully – to frame a legal issue for appeal that might warrant this Court's attention. But the Court already settled the controlling issues on the prior appeal, holding that sufficient funding must be *virtually*, but not *absolutely*, guaranteed – and recognizing that the Plan intends for the District Court to consider this question *during* the pendency of the settlement program based on projections that, by definition, cannot yield absolute certainty. Dow Corning's principal argument for legal error – that the District Court could not rely on the Plan-mandated projection methodology because it does not allow for a precise quantification of risk – ignores this Court's prior decision and attempts to rewrite the Plan by imposing an absolute certainty standard that would delay Premiums until the end of the settlement. Dow Corning supports this improper revisionism with a new, tortured reading of the Settlement Facility Agreement ("SFA") that would render useless the projections to be considered in connection with approving Second Priority Payments. It further objects to the District Court's consideration of

contemporaneous evidence of the parties' intention to pay Premiums *during* the settlement – evidence that is perfectly consistent with this Court's earlier decision – and baselessly argues that the District Court ignored its expert testimony and shifted the burden of proof based on statements that simply reject Dow Corning's positions on the merits.

Dow Corning is no more successful in demonstrating that the District Court clearly erred in finding a virtual guarantee of adequate funding. The CAC's expert, Dr. Mark Peterson, one of the nation's leading experts in mass tort claim resolution, explained in his initial declaration ("Peterson Decl.") (RE 1286-4, under seal) and reply declaration ("Peterson Reply Decl.") (RE 1306-1, under seal) that the IA's projection technique is the standard and indeed only reasonably available method of predicting future claims in a closed pool of claimants for which no relevant epidemiology is, or could be, available. Indeed, Dow Corning's own expert, Dr. Fred Dunbar, relied on essentially the same methodology to establish Plan viability. Routine disclaimer language and inevitable uncertainties as to individual aspects of the IA's projections do not change the facts that (1) the IA's projections have proven extremely accurate and indeed too *high*, and (2) conservative assumptions built into the IA's projections coupled with the huge remaining cushion make it virtually impossible for the cap to be exceeded.

Dow Corning's arguments to the contrary have only grown weaker with the passage of time. Its principal expert, Paul Hinton, offered no coherent explanation of how the most conservative projection of 1,836 new disease claims could suddenly mushroom into 10,000 and thus threaten the funding cap. He merely stressed the unreliability of estimations conducted much earlier in the claiming process in the context of a different tort – asbestos – in which claims may emerge from the general population over more than 50 years, and warned of unexpected claim surges based on wildly different examples like the Agent Orange litigation and September 11th Victims' Fund. Tellingly, he largely ignored the more relevant precedent of the MDL-926 Breast Implant Revised Settlement Program ("RSP") – which closely parallels the Dow Corning settlement and wrapped up with no major claim explosion eight years ago. Mr. Hinton further inexplicably argued that the IA should have considered epidemiology, although he failed to identify any relevant data or answer Dr. Peterson's point that epidemiology simply cannot be employed to predict claims in this type of population.

Despite Dow Corning's spin, the real issues on this appeal are factual, not legal. Not only was the District Court's virtual guarantee conclusion not clearly erroneous – it was clearly correct and should be affirmed.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the law of the case bars Dow Corning's attempt to engraft on the "virtual guarantee" standard requirements that would effectively bar the District Court from relying on the projection methodology required by Dow Corning's confirmed Plan and delay even partial Second Priority Payments until the conclusion of the settlement program.

2. Whether the District Court clearly erred in finding that the $300 million funding cushion under the Independent Assessor's projections establishes a virtual guarantee of adequate funding to pay all remaining base claims as well as 50% installments on Second Priority Payments.

STATEMENT OF THE CASE AND FACTS

The Premium Payments at issue here are an integral part of the settlement embodied in the Plan. The CAC's predecessor, the Tort Claimants' Committee, joined with Dow Corning to solicit claimant support for a settlement that included no cost-of-living increases despite years of bankruptcy-related delay. Claimants were induced to support the settlement, in part, by the promise that they would receive Premiums if, as was expected and has proven true, there was enough money in the Settlement Fund to pay both base and Premium claims. More than twelve years of experience in the SF-DCT as of 2016, coupled with 15 years of

experience in the RSP[3] and confirmed by years of reliable projections generated by the IA, all support the consensus of the Finance Committee, the CAC, and the District Court that it was appropriate to resume payment of 50% installments on the long-delayed Premiums.[4]

A. Background and Prior Proceedings

The Plan provides funding of up to $2.35 billion (determined on an NPV basis by discounting all payments 7% annually back to 2004), $400 million NPV of which is set aside for litigation, leaving a funding sub-cap of $1.95 billion NPV to be used to pay settlements. After the funds currently in the Trust are paid down, the Settlement Facility may call upon Dow Corning to make further contributions against available payment ceilings to pay approved claims, up to the cap on qualified transfers. Because approximately $29.7 million NPV has been spent to resolve litigation claims, the funding cap for transfers into the Trust is $1.9797 billion NPV. RE 1279-2, Page ID #19786. And because the Initial

[3] The RSP was offered by other breast implant manufacturers as a voluntary "opt-in" settlement after the collapse of a global settlement in which Dow Corning had also participated before entering bankruptcy. The Dow Corning settlement was largely modeled on the RSP.

[4] Dow Corning gratuitously and misleadingly argues that its products have been proven not to cause disease (App. Br. 6-7), but it agreed to a multi-billion dollar settlement at arm's length based on a range of injuries and risks associated with its products, including rupture, product failure, localized injury, and a hotly contested dispute over systemic disease causation. The settlement reflects the parties' assessment of all of these risks and should be enforced fairly according to its terms.

Payment, insurance proceeds, and interest have covered all claims to date, the unused annual payment ceilings have rolled forward, accruing 7% per year. *Id.* Page ID #19789.

To encourage tort claimants to vote for the Plan in 1998, Dow Corning promised them Premium Payments of $5,000 for rupture claims and 20% above the base payment for disease claims, when and if it was determined that sufficient funding existed to cover all First Priority Payments (mainly consisting of breast implant base claims, along with certain smaller categories like Other Product Claims). Claimants were told that Premiums would likely be issued a few years into the program, which began paying claims in 2004. *See* Dow Corning Disclosure Statement at 10 (RE 1285-2, Page ID #20020) (Premiums likely "delayed for several years"); *id.* at 97 (*id.* Page ID #20021) (Premiums to begin "some years after the Effective Date," such that earliest approved claimants might have to wait "several years" for second payment).

Dow Corning's expert, Dr. Fred Dunbar, testified at confirmation that Premiums "are going to be paid seven years from now" (RE 1285-3, Page ID #20024-25) – an opinion he offered to establish that the promise of Premiums would induce a higher percentage of tort claimants to settle than had under the RSP. The Bankruptcy Court expressly relied upon this testimony, finding "beyond reproach" Dr. Dunbar's analysis concluding that the Plan's enhancements over the

RSP (prominently including Premiums) would induce more people to settle. *In re Dow Corning Corp.*, 244 B.R. 721, 731 (Bankr. E.D. Mich. 1999), *rev'd in part on other grounds*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002). Dow Corning's suggestion that the parties expected or intended that Premiums would be paid only at the conclusion of the settlement program if funds were "left over" (App. Br. 3) is simply false.

Premiums are one of three categories of Second Priority Payments that require court authorization.[5] Section 7.03 of the SFA provides that "the Finance Committee shall file a recommendation and motion with the District Court requesting authorization to distribute Second Priority Payments." RE 1279-1, Page ID #19717, § 7.03(a). The motion must be accompanied by a detailed accounting of claims payments and distributions and a projection and analysis of the cost of making all current and future First Priority Payments, prepared by the IA pursuant to Section 7.01(d). *Id.* Page ID #19713-14 Second Priority Payments may be made upon a finding by the District Court "that all Allowed and allowable First Priority Payments and all Allowed and allowable Litigation Payments have been

[5] The other two are Class 16 Claims, reimbursing Dow Chemical for certain settlement payments made during Dow Corning's bankruptcy, and Increased Severity Payments to claimants who receive base disease payments below the maximum amount and later submit documentation qualifying them for a higher category of disease payment. Increased Severity Claims under Option 1 are capped at $15 million NPV. Option 2 claims are not capped but have more rigorous medical criteria. RE 1279-2, Page ID #19740-41.

paid or that adequate provision has been made to assure such payment (along with administrative costs) based on the available assets." *Id.* Page ID #19717, § 7.03(a).

In 2011, after seven years of claims experience running well below Dr. Dunbar's projections and demonstrating the reliability of the IA's methodology, the Finance Committee conservatively recommended that the Court authorize 50% installments on Premium Payments already earned and to be earned in the future based on approved and paid disease and rupture claims. After briefing and a hearing, the District Court on December 31, 2013 authorized the 50% installments. *See In re Settlement Facility Dow Corning Trust*, No. 00-00005, 2013 WL 6884990, at *10 (E.D. Mich. Dec. 31, 2013), *rev'd and remanded*, 592 F. App'x 473 (6th Cir. 2015). As a result, starting in April 2014, approximately $92.2 million ($46.2 million NPV) was paid out over several months to thousands of claimants. Final IA Report at 15 (RE 1279-2, Page ID #19740). To put this in perspective, these partial payments commenced nearly *sixteen years* after claimants were asked to vote and a decade after the Settlement Facility began paying claims.

This Court reversed early in 2015, holding that the District Court (1) should have applied a higher, "virtual guarantee" standard of funding adequacy rather than one of "reasonable assurance" and (2) should have admitted expert testimony regarding the reliability of the IA's projections. *See In re Settlement*

Facility Dow Corning Trust, 592 F. App'x 473, 479 (6th Cir. 2015). The Court confirmed, however, that the Dow Corning Plan intended to allow payment of Premiums *during* the course of the settlement. *Id.* at 480 (virtual guarantee standard "does not require absolute certainty"); *id.* at 479 ("Because it is impossible to account for all possible future uncertainties, we will not impose an 'absolute guarantee' standard of confidence, as that would make SFA § 7.03(a) superfluous."). Following this decision, Premium Payments have remained frozen for more than three years.

Through June 2015, tort claimants had earned but not yet received Premiums of approximately $22.8 million ($9.4 million NPV if paid in 2017) (RE 1279-2, Page ID #19742), creating an issue of disparate treatment among similarly situated claimants that has only worsened as additional claimants have received base payments and qualified for Premiums. The IA estimated that paying all 50% Premiums through the conclusion of the settlement program, including the previously frozen claims, will cost approximately $30 million, or $12.2 million NPV (*id.* Page ID #19740) – only about 0.6% of the settlement fund, undercutting Dow Corning's warning of "massive" payments (App. Br. 3).

B. The 2016 IA Report

The 2016 Final IA Report describes, consistent with the last several reports, a mature mass tort in the process of winding down.[6] Through June 30, 2016, the SF-DCT paid a total of $614,060,056 in Class 5 (domestic) disease claims (plus Premiums of $47,429,050); $427,028,547 in rupture claims (plus Premiums of $42,410,384); $150,717,426 in explant payments; and $45,095,406 in expedited release payments. RE 1279-2, Page ID #19774. Class 6.1 and 6.2 (foreign claimants) were paid an aggregate of approximately $44 million in these categories. *Id.* Page ID #19781. Deadlines for most categories of claims have passed, and the only substantial unliquidated liability remaining for the Trust relates to disease claims, which have slowed dramatically. Having already paid more than 29,000 individual disease claims, the SF-DCT received only 158 Option 1 forms and 56 Option 2 forms during 2016. *See* SF-DCT Summary of Monthly Department Reporting, December 2016 (RE 1286, under seal).

[6] Dow Corning concurs, whatever it says now for litigation purposes. Based on declining claims experience, Dow Corning in December 2014 reduced the liability it carried on its books for implant claims from approximately $1.7 billion to approximately $400 million. Dow Chemical Company Form 8-K, dated Dec, 17, 2014 (RE 1285-4, Page ID #20028). By June 1, 2016, when Dow Chemical took over sole ownership of Dow Corning, that liability had been further reduced to $290 million. Dow Chemical Company Form 10-Q for period ending June 30, 2016, at 30 (RE 1285-5, Page ID #20033).

The projections contained in the Final IA Report for the remaining two-plus years of the settlement program, like past reports, rely on a series of conservative assumptions. Among other things, the IA estimates future liability each year based both on a "constant" model (assuming that recent claims experience will continue at the same level) and a "decay" model (based on a forecasted downward trajectory) and also identifies certain "scenarios" that might increase the Trust's liability and assumes that they are all resolved in a way that maximizes liability. RE 1279-2, Page ID #19735, 19738.

The IA projected that all base claims will be paid with a cushion of approximately $159 million NPV. The approved payments will not seriously impact that cushion: Payment of 50% Premiums through the end of the Settlement Program ($30 million nominal, $12.2 million NPV), plus 50% of Class 16 Claims ($11.9 million nominal, $4.9 million NPV) and 50% of the capped amount allocated for Increased Severity Option 1 Claims ($7.5 million NPV) reduces the NPV surplus only to $136.9 million. *Id.* Page ID #19740-43. Only a fraction of the Premiums figure is subject to projection uncertainty, and the latter two numbers are fixed.

There are only two variables that could even conceivably threaten this funding cushion. The IA eliminates the first of these, the number of Option 2 Increased Severity Claims, by assuming a literal worst case (indeed *worse* than

worst case) scenario. Despite multiple mailings over more than a decade reminding claimants that this benefit is available, only approximately 40 such claims had even been filed through May 2016. *Id.* Page ID #19741. However, the IA makes the extreme assumption that *every single* approved Option 2 disease claimant who received less than the maximum benefit (roughly 5% of approved disease claims) will, in fact, (1) experience worsening symptoms; (2) actually file an Increased Severity Claim; and (3) actually be approved for a claim at the maximum benefit level. *Id.* This includes claimants who will file their base disease claims only at the deadline, who of course will have no opportunity to file increased severity claims. Even this (more than) worst case assumption – that more than *1,800* claimants will seek and receive average supplemental payouts of approximately $101,855 – would result in liability for the Trust of only $185.3 million nominal ($76 million NPV). *Id*. Only 50% of that was authorized under the Recommendation – leaving an NPV surplus of approximately $100.4 million. *Id.* Page ID #19743.

The only remaining potential variable is the possibility of an extreme and unexpected surge in base disease claims before the settlement closes. (A surge in expedited release claims,[7] the only other available benefit for which the deadline

[7] Claimants may elect to receive a payment of $2,000 in return for a release of all rights to file a disease claim.

has not passed, cannot mathematically threaten the cap. Indeed, the IA already *assumes*, with excessive caution, that every claimant with a valid Proof of Manufacturer ("POM") will receive either a disease or expedited payment.) The IA projects future disease filings between 727 claims (under the decay model) and 1,836 claims (under the constant model) prior to the June 2019 deadline, of which approximately 1,567 (or roughly 85%) are expected to have valid POMs and be approved. *Id.* Page ID #19752-53, 19764, 19767. These totals include an expected surge over the current pace of claim filing – as noted, only 214 disease claims were filed during all of 2016.

These estimates are consistent with the modest increase in meritorious claims filed at the RSP disease claim deadline in December 2010.[8] However, even if the projection proved to be understated, the remaining cushion would, to a virtual if not absolute certainty, be enough to pay any unexpected claims. $100.4 million NPV, discounted back to 2004 at 7% per year, translates into more than $300 million in cash available to pay any unexpected final claims.[9]

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[8] According to the Final Report on Claims Processing in the Revised Settlement Program (Feb. 21, 2014), the RSP experienced a modest filing surge of approximately 2,000 claims at the December 2010 deadline. RE 1286-1, under seal, at 5. However, many of these filings were "protective" and not meritorious, as the RSP paid only 793 claims in 2011, 225 in 2012, 45 in 2013, and two more before shutting down in 2014. *Id*. Ex. A at 2.

[9] *See* RE 1286-2, under seal, *DCT Liability Model June 2016 Data Extract*, NPV Factor line (indicating NPV factor of .34 for 2020 and .31 for 2021, suggesting

The growing cushion that comes with the passage of time permits the Trust to cover more claims, since tort claimants receive no cost of living adjustment. With an average projected disease claim value of $24,039 (RE 1279-2, Page ID #19776), plus an average of $4,800 in Premiums, the $300 million cushion could absorb more than *10,000* additional approved disease claims – nearly the entire universe of claimants who have filed valid POMs but no disease or expedited claim. *Id.* Page ID #19755 (17% of 66,809 POMs). The *entire Dow Corning settlement program* through June 2016 paid only 29,268 total Class 5 disease claims, for a total nominal payment amount of $614,060,056. *Id.* Page ID #19774-75. The projected cushion equals nearly half the amount paid for *all* Class 5 disease claims since 2004. This provides a virtual guarantee of funding adequacy under any reasonable definition of that term.

C. The Finance Committee's Recommendation

Although the Plan documents do not require it, the Finance Committee requested that the IA opine as to whether its 2016 projections satisfied the "virtual guarantee" standard. In response, the Final IA Report states that "a virtual guarantee is justified," confirming the IA's high level of confidence that there will be sufficient funding for all First Priority Payments based on payment of

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cash available to process late surge claims will be roughly triple remaining NPV funding amount).

50% Premiums to holders of base claims approved and paid through June 2015 and 50% of Class 16 payments. *See* RE 1279-2, Page ID #19745. In response to written questions from the CAC, the IA extended the same assurance for claims paid through June 2016. RE 1286-3, under seal, IA Response to CAC 11/4/16.

After receiving the Final IA Report on October 18, 2016, the Finance Committee requested that the parties submit written comments on the adequacy of funding and meet to set forth their positions and answer questions. The Finance Committee then submitted its Recommendation and Motion (the "Recommendation") seeking the Court's approval for the SF-DCT to issue 50% installment payments on all categories of allowed and approved Second Priority Payments. RE 1279. The Finance Committee stressed "two critical checks" confirming the likely "accuracy of the IA's projections": (1) that the IA "has consistently been more conservative and has overestimated the number of disease claims" – which suggests that "there will be more, rather than less, surplus funding for Second Priority Payments" – and (2) that the actual experience in the SF-DCT has been *lower* than the claims paid in the RSP, while the IA's projections are actually *higher* than the final RSP results – which "provides further confidence that the IA Report has over-estimated rather than under-estimated, the SF-DCT final outcome." *Id.* Page ID # 19678. The Finance Committee further noted two severe inequities that would flow from further delays in authorizing completion of 50%

Premium Payments: First, the "horizontal equity" problem of denying payments for claims processed after January 1, 2014, and second, the fact that seven to ten percent of claimants are expected to die before the conclusion of the settlement program, depriving them of the benefit of Premiums if payments are further delayed. *Id.* Page ID # 19681.

The CAC and Dow Corning submitted written responses to the Recommendation, respectively supporting and attacking it, and replies responding to each other's arguments and analysis. *See* RE 1285, 1287, 1305, 1307. Consistent with this Court's mandate, the parties were permitted to submit expert declarations, as well as rebuttal declarations. RE 1286-4, under seal; 1287-2 Page ID # 20111-26; 1287-3, Page ID #20127-36; 1287-4, Page ID #20137-53; 1306-1, under seal; 1308, under seal. The District Court held a hearing on the Recommendation on March 23, 2017 and then permitted the Finance Committee to file a supplemental memorandum (RE 1316), to which the parties responded (RE 1322, 1323).

D. The District Court's Decision

On December 27, 2017, the District Court issued its Memorandum Opinion and Order (the "Order") granting the Finance Committee's request to authorize 50% installments on Second Priority Payments. RE 1346. The District Court summarized the provisions governing approval of Second Priority Payments

and the parties' respective positions before concluding that the evidence established a "virtual guarantee" of adequate funding. RE 1346, Page ID #21589. The District Court appropriately based this conclusion on the IA's projections, as required by the Plan. The court noted that the IA used conventional, widely accepted statistical techniques embodying conservative assumptions and with an impressive track record of accuracy over the course of the settlement program (*id.* Page ID #21585-86, 21588) and that Dow Corning did not present any alternative methodology or data that would materially alter the projections (*id.* Page ID #21587). The court took account of Dow Corning's arguments about the possibility that an unexpectedly high number of remaining claimants might surface with last-minute claims, but noted a series of factors – including the dramatic slowing of claims in recent years despite repeated notices to claimants; the experience of the MDL-926 RSP; and the absence of any evidence suggesting that the slowdown of claims "will somehow dramatically reverse course" – supporting the IA's finding that sufficient funding was virtually guaranteed. *Id.* Page ID #21588. The District Court ultimately agreed with the IA's conclusion, stressing that, while every individual element of the projections cannot be guaranteed, the "ultimate projection" of a virtual guarantee was supported by the IA's conservative assumptions and the huge margin for error reflected in the $100.4 million NPV cushion. *Id.* Page ID #21588-89.

SUMMARY OF ARGUMENT

The District Court adhered to this Court's mandate on remand, properly applying the "virtual guarantee" standard and permitting the parties to submit whatever materials they wished with respect to the Finance Committee's Recommendation. Dow Corning's arguments for legal error are inconsistent with this Court's prior decision and would improperly rewrite the Plan to bar approval of Second Priority Payments based on projections during the settlement program: (1) The Court's decision does not require that the "virtual guarantee" finding be supported by a statistical error rate analysis; (2) Dow Corning's new reading of Section 7.03 as requiring a projection only of currently pending claims rather than the cost of paying *all* claims makes no sense and would render the projection task useless; (3) the District Court did not seek to alter the "virtual guarantee" standard on remand by citing contemporaneous evidence of the parties' intention to pay Premiums during the settlement process; and (4) the District Court neither shifted the burden of proof to Dow Corning nor failed to consider its expert evidence – it simply found the CAC's contrary evidence and arguments more persuasive.

The District Court's finding of a virtual guarantee that issuance of 50% installments on Second Priority Payments would not threaten the funding cap was not clearly erroneous. The holding was supported by substantial evidence in the form of the Final IA Report (backed up by years of accurate, and indeed

conservative, projections) and detailed declarations by the CAC's expert, Dr. Mark Peterson, explaining that (1) the IA's methodology is widely accepted and recognized as the best, if not only, reliable means to predict future claims within a closed universe of self-selected claimants; and (2) the IA's application of that methodology here was based on conservative assumptions and yielded a sufficient cash cushion that it would be nearly impossible for unexpected claims to threaten the funding cap.

Dow Corning's arguments to the contrary distort the nature of the IA's methodology, ignore the conservative assumptions and other factors suggesting that the margin for error has been *understated*, and read too much into boilerplate disclaimer language that would accompany any projection analysis. Dow Corning inexplicably faults the IA for not using epidemiology, when no relevant data exists and epidemiology in any event cannot be used to predict claims within a closed universe of self-selected claimants. And Dow Corning's attempt to create doubt by invoking the claiming history of other, very different mass torts – while ignoring the directly relevant parallel experience of the RSP – similarly fails to identify any ground for questioning the District Court's conclusion, much less a basis for finding that it was clearly erroneous.

STANDARD OF REVIEW

As Dow Corning recognizes, "this Court has already interpreted the language of the Plan that sets forth the necessary standard." App. Br. 23. While both parties are bound by that ruling under the law of the case doctrine, *see United States v. Charles*, 843 F.3d 1142, 1145 (6th Cir. 2016), the District Court's resolution of *factual* issues on remand – most notably, the existence of a sufficient funding cushion to satisfy the undisputed "virtual guarantee" standard – is entitled to deference unless clearly erroneous. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 585-86 (6th Cir. 2015) (factual findings set aside only if "based on the entire record we are left with the definite and firm conviction that a mistake has been committed") (internal quotation omitted). Contrary to Dow Corning's assertion (App. Br. 24), this case does not involve application of disputed legal standards to undisputed facts, but rather the opposite.

Moreover, as this Court recognized in *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 772 (6th Cir. 2010), because Judge Hood "has presided over this bankruptcy case continuously since 1995" in various capacities and has "acted as the court of first resort for nine," now eighteen years, "[t]here is simply no denying that she is much more familiar with this Plan – and with the parties' expectations regarding it – than [this Court is]," and as a result her readings of the Plan documents warrant "a measure of deference." *Id.* Relatively

less deference is owed to the District Court's interpretation of Plan language and more, indeed almost complete, deference is given to its weighing of extrinsic evidence. *Id.*

ARGUMENT

I. DOW CORNING'S ARGUMENTS FOR LEGAL ERROR IMPROPERLY ATTEMPT TO REWRITE THE CONFIRMED PLAN AND ARE FORECLOSED BY THIS COURT'S PRIOR DECISIONS

Dow Corning's attempts to frame legal issues for appeal actually violate the very law of the case principles it purports to invoke.

A. This Court's Prior Decision Set the Parameters Governing Remand, Which Dow Corning Now Seeks to Change

Most of Dow Corning's arguments are predicated on a fundamental misreading of this Court's earlier decision as rejecting the projection methodology specified in SFA Section 7.03 as a basis for determining funding adequacy. To the contrary, the Court specifically recognized that "the district court must rely on projections of the availability of funds, including the costs of making future First Priority and Litigation Payments and the cost of the requested Second Priority Payments, to determine whether making Second Priority Payments would jeopardize future First Priority and Litigation Payments." *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 478; *see also id.* at 480-81 (District Court correctly held that it "must make its decision to authorize Second Priority

Payments '*based* on the Independent Assessor's analysis and projections'") (citation omitted).

This merely acknowledges what the parties agreed to in the Plan documents: SFA Section 7.01(d) specifically directs the Finance Committee and the IA to generate quarterly projections of the cost of resolving all current and future claims based on the very types of data that Dow Corning says cannot support a reliable projection: "(i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending Claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility." RE #1279-1, Page ID #19713-14. Section 7.03(a), in turn, specifies that the Finance Committee's recommendation and motion seeking authorization of Second Priority Payments "shall be accompanied by a detailed accounting of the status of Claims payments," including the projections "described in Section 7.01(d)." *Id.* Page ID #19717. Based on this recommendation, the District Court may order distribution of Second Priority Payments if all First Priority and Litigation claims have been paid or "adequate provision has been made to assure such payment." *Id.*

In resolving the meaning of "assure" on the prior appeal, this Court did not hold that the Section 7.03(a) decision cannot, as the SFA specifies, be

based on the Section 7.01(d) projections, but in fact confirmed that it *must* be. The Court simply held that, in *applying* this methodology, the District Court was required to find assurance of adequate funding to a higher level of certainty – more than "strong likelihood" but less than an absolute guarantee. Indeed, it is precisely *because* the Court understood that this finding would be based on *projections* prior to the end of the settlement program – and not determined only after 2019 when all claims were already filed – that it went out of its way to stress that a "virtual" guarantee still allowed some small measure of uncertainty: "Because it is impossible to account for all possible *future* uncertainties, we will not impose an 'absolute guarantee' standard." *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 479 (emphasis added). This is consistent with application of the IA's Plan-mandated projection methodology.

Significantly, this Court's ruling was based on its construction of the plain language of the SFA, not any endorsement of Dow Corning's criticisms of the mandated methodology. The Court rejected the District Court's use of the terms "reasonably assured" and "adequate provision" to modify the core finding that payment of all claims is "assured." *Id.* But the Court also recognized that requiring absolute certainty would rule out the use of projections – which would improperly "make SFA § 7.03(a) superfluous," in violation of basic contract interpretation principles. "Accordingly, we adopt the Appellant's terminology of

'virtual guarantee' to describe the required confidence standard under SFA § 7.03(a). While this standard *does not require absolute certainty*, it is nonetheless stricter than the 'strong likelihood' or 'more probable than not' levels of confidence that describe 'adequate assurance.'" *Id.* (emphasis added). Significantly, this formulation does not require any particular quantification of risk or exclude any particular methodology. As discussed below, Dow Corning's attempts to engraft such requirements distort and, ultimately, violate both the plain Plan language and this Court's earlier ruling.

B. The District Court Faithfully Applied This Court's Rulings On Remand

Each of Dow Corning's arguments for legal error reflects, to the contrary, an attempt to rewrite its confirmed Plan, this Court's prior ruling, or both.

1. "Quantification" of Risk is Neither Required Nor Feasible

Dow Corning's principal legal argument is that the "virtual guarantee" standard cannot be satisfied absent a statistical quantification of risk – even in the face of a funding cushion so immense that it is all but impossible for funds to run out. App Br. 28-30. But nothing in this Court's prior decision even hints at such a requirement. To the contrary, the prior decision *precludes* this argument.

Dow Corning concedes that the projection methodology employed by the IA per Section 7.01(d) simply does not provide a statistical means "to quantify the risk or degree of uncertainty, risk of error, probability or confidence in the

Independent Assessor's evidence." App. Br. 18. Indeed, this undisputed fact was before this Court at the time of its prior ruling,[10] but this Court nevertheless confirmed that the Plan documents *require* the District Court to base its ruling on the IA's projections. If the Court meant to require that the "virtual guarantee" standard be supported by a statistical error rate analysis, it would have said so. Instead, it merely described the standard as being "stricter than the 'strong likelihood' or 'more probable than not' levels of confidence that describe 'adequate assurance.'" *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480.

Dow Corning tries to shoe-horn the quantification concept into the "virtual guarantee" standard by citing cases (some of which were cited below for illustrative purposes) using similar language to describe certain factual circumstances. For example, *In re CM Holdings, Inc.*, 254 B.R. 578, 614-16 (D. Del. 2000), *aff'd*, 301 F.3d 96 (3d Cir. 2002), found that life insurance dividend performance within 1.13% of projections could be described as virtually guaranteeing dividends. And *Marine Bank v. Weaver*, 455 U.S. 551, 551-52, 558

[10] Brief of Appellants Dow Corning Corp. *et al.*, No. 14-1090, April 23, 2014 (ECF No. 37), at 18 (IA's analysis "did not contain any probability analysis or analysis of risks," which Dow Corning argued was necessary to show adequate funding); Brief of Claimants' Advisory Committee, No. 14-1090, May 27, 2014 (ECF No. 38), at 55 n.21 ("Dr. Mark Peterson explained that [the IA's] well-accepted method of projecting future claims based on past claims history" did not require "a formal error rate assessment").

(1982), cited the fact that the FDIC covers more than 99% of deposits in failed bank cases in concluding that a certificate of deposit is "virtually guaranteed" and thus not within the definition of a security.

But these cases, even if they were not so obviously far-afield factually, do not purport to define the maximum quantified risk that could ever be called a "virtual guarantee" – they merely hold that these particular fact patterns could be so described. Nor does *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564 (10th Cir. 1991), offer a fixed definition of "virtual guarantee." That case merely holds that the standard of "essentially guarantee[ing]" employee retirement investments is not met when "the value of these investments is entirely dependent on the value of the employer company's stock" (*id.* at 582) – a situation obviously far short of a near-guarantee by any definition.

The CAC does not disagree that the level of certainty required by the "virtual guarantee" standard is in the realm of 99%. If there were more than de minimis risk to the funding cap, the CAC, as a fiduciary for all claimants, would not support approval of Second Priority Payments. But that does not mean that the analysis supporting this conclusion must itself include a statistical error rate analysis, or that any methodology lacking such formal quantification is a mere "guess," as Dow Corning argues. App. Br. 30.

To the contrary, the IA's methodology achieves a high level of reliability by (1) including projections based on alternative "constant" and "decay" models to serve as a reliability check; (2) building in a series of conservative assumptions that augment the margin for error; and (3) fine-tuning and updating assumptions based on relevant variables, such as the proportion of remaining claimants who are pro se. As a result, the methodology has proved exceptionally reliable – permitting a confident finding, in view of the huge remaining funding cushion, that it would be nearly impossible for funds to run out. *See* Peterson Decl. (RE 1286-4, under seal) ¶¶ 5, 21-28); Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 3, 12-15.

In any event, this Court did not require a statistical error rate analysis. Reading one into its earlier decision would illogically render it impossible to use the very methodology the Court recognized is mandated by the Plan.

2. Dow Corning's Other Arguments For Legal Error Based on Use of the Projection Methodology Similarly Ignore the Plain Language of the Plan and This Court's Prior Ruling

Dow Corning offers a muddle of additional arguments challenging the District Court's holding that the Plan requires it to rely on the IA's projections in determining whether funding of base claims is assured. App. Br. 29-39. Many of these are veiled *factual* assaults on the reliability of the IA's projections, which will be addressed below in Point II. However, the District Court's *legal* conclusion

that the IA's methodology is mandated by the SFA merely echoes this Court's own holding. Indeed, Dow Corning itself recognizes that the District Court was required to consider the IA's projections. *Id.* at 36. And the District Court never precluded consideration of *additional* evidence or methodologies. It is thus difficult to understand what remains of the argument that the District Court *legally* erred in relying on the IA's methodology.

Dow Corning nevertheless pushes ahead, relying primarily on a strange construction of the SFA language that it first concocted only after remand. Dow Corning acknowledges (App. Br. 35-37) that SFA Section 7.03(a) requires the Finance Committee's recommendation on Second Priority Payments to be accompanied by a detailed accounting of claims payments, including certain projections regularly generated under Section 7.01(d). Dow Corning argues, however, that because Section 7.03(a) refers to a projection of "pending" claims and does not, like Section 7.01(d) specifically mention "future" claims, the SFA should be read to require only that the District Court consider some subset of the IA's projections relating to the cost of resolving asserted but not yet resolved claims. App. Br. 36-37.

This argument is, with all respect, ridiculous. Section 7.03(a) expressly calls for reliance on the IA's projections "as described in Section 7.01(d)." The reference to "pending" claims is thus obviously shorthand for all

claims that the IA tracks and projects under Section 7.01(d), not just those that have been asserted and not yet processed. Indeed, *all* claims in the Dow Corning settlement are appropriately described as "pending," because all claimants have identified themselves by filing at least a Proof of Claim or equivalent – there are no true, unidentified "futures," as in asbestos cases.

In any event, no other reading remotely makes sense. To be of any use, the Section 7.03(a) analysis must address the cost of resolving *all* claims, not just those already filed. Disregarding the projection of unasserted claims expressly required under the cross-referenced Section 7.01(d) would defeat the purpose of determining funding adequacy. The Court should reject a reading of Plan language that not only would be inconsistent with its past ruling but makes absolutely no sense.

Dow Corning attempts to tease out a further distinction by noting that Section 7.01(d) refers to the "likely" amount needed to pay future claims, while Section 7.03(a) requires that future funding be "assured." App. Br. 35. But likelihood comes in degrees, and projections are to be conducted throughout the settlement for various purposes. At some point, the amount "likely" to be needed can be determined with enough of a margin for error that funding will be "assured." We are considerably past this point now, with a $300 million cash cushion, claims slowed to a trickle, and the settlement drawing to a close.

Dow Corning also points to a conclusory statement by its expert Paul Hinton about the inherent unreliability of projections, which in turn relies solely on inapposite asbestos cases. App. Br. 37 (citing RE 1287-2, Page ID #20115-16). These cases – *In re Armstrong World Indus. Inc.*, 348 B.R. 111 (D. Del. 2006), *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719 (D. Del. 2005), and *In re Federal-Mogul Global, Inc.*, 330 B.R. 133 (Bankr. D. Del. 2005) – all involved litigation over the amounts needed to fund asbestos trusts. Here, in contrast, the claiming process is winding down. Moreover, asbestos cases involve a 50-year claiming horizon in which disease claims emerge in the general population, including from claimants who are not even yet aware that they were exposed. *See* Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 9-11. Here, in contrast, the issue is how many claims will trickle in during the last stages of a lengthy process from a fixed pool of registered claimants who have received multiple notices of their opportunity to claim. That is why the IA's forecasts have proven reliable while those in the cited cases have not.

Ultimately, Dow Corning is playing semantic games. It cannot seriously argue that the parties did not intend for the IA's projections to be the principal basis for determining adequate funding – indeed, this Court has already so held. That doesn't mean, in Dow Corning's strawman formulation, that the IA's projections in a particular year "must be deemed sufficient" to authorize Second

Priority Payments. App. Br. 35. That is a *factual* issue, which the parties are free to contest. But by the same token, it is unsupportable to argue that the IA's projections can *never* establish funding assurance, no matter what they show, particularly since no other projection method has ever been suggested. *That* would be inconsistent with the parties' agreement and the law of the case.

3. The District Court Did Not Err in Citing Contemporaneous Evidence Demonstrating the Parties' Intent to Pay Premiums Long Before This Point in the Settlement

The District Court also did not legally err, as Dow Corning argues (App. Br. 39-40), by citing contemporaneous evidence demonstrating that the parties contemplated paying premiums just a few years into the settlement program. This evidence is in no way inconsistent with this Court's prior decision.

As noted above at 9-10, Premiums were promoted to claimants as a material enhancement over the RSP, and Dr. Dunbar's projections showed that the enhanced settlement would induce more claimants to settle rather than litigate. *See* RE 1305-2, Page ID #20326, 20329-31 (charts discussing impact of enhancements on opt-out rate). Dr. Dunbar's cited testimony was offered in his cross-examination to defend his view that Premiums would encourage claimants to settle even if delayed for *as long as* seven years. *See* RE 1285-3, Page ID #20024-25.

Dr. Dunbar's projections were offered not merely as "one possible distribution scenario" (App. Br. 39), but to establish funding adequacy and thus the

viability of the Plan. The Bankruptcy Court expressly relied upon this testimony, finding "beyond reproach" Dr. Dunbar's analysis concluding that the Plan's enhancements over the RSP (prominently including Premiums) would induce more people to settle. *In re Dow Corning Corp.*, 244 B.R. at 731. The CAC (and the District Court) cited Dr. Dunbar's analysis now not to prove that the parties "set a specific point in time for the distribution of Second Priority Payments" (App. Br. 39) – that point is in any event years past now – but simply to show that the parties contemplated paying Premiums *during* the pendency of the settlement, not at or near the end.

Moreover, the record confirms the parties' expectation that Premiums would be paid in circumstance with far greater funding uncertainty than exists today. Dr. Dunbar's projections showed more than $150 million in *100%* Premium Payments being issued in year eight – with more than $150 million in base disease and explant claims still projected and eight years of remaining uncertainty. RE 1305-2, Page ID #20340. At the time of the Final IA Report, we were already *five years further along* in the settlement program than the point described in Dr. Dunbar's projections, with rupture and explant claims closed, only about $92 million in remaining base claims forecasted, and less than three years (now barely more than one) left in the program. *Compare id.* with RE 1279-2, Page ID #19811 ("FCST" total for Class Five Payments 2016-2020). There is *less*

risk to base payments now than there would have been under the scenario that Dr. Dunbar presented to the Bankruptcy Court to support confirmation.

The District Court properly invoked this evidence to demonstrate that reliance on projections to approve Second Priority Payments *during* the settlement, as Section 7.03 plainly contemplates, is consistent with the parties' contemporaneously expressed intent. *See Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006) (contract construed to effectuate expressed intent of parties in light of circumstances and object of contract). That this evidence was before the Court on the prior appeal hardly establishes, as Dow Corning argues (App. Br. 39) that the District Court used it to "re-interpret" section 7.03. Rather, it shows that this Court was familiar with the circumstances of the Plan when it confirmed the very reading of Section 7.03 that the District Court followed on remand. It is only Dow Corning that seeks to relitigate the prior decision.

Nor did the District Court use this contemporaneous evidence to impose "a lesser standard than the 'virtual guarantee' standard established as law of the case" (App. Br. 39-40), simply because it referred once, in an unrelated portion of the Order, to the SFA permitting Premium Payments once funding is "adequately assured." *See* RE 1346, Page ID #21586. Notwithstanding this single, informal usage, the District Court expressly acknowledged that it was "bound by the Sixth Circuit's 'virtual guarantee' standard" (*id.* Page ID #21569);

referred to that standard more than a dozen times throughout the Order (*id.* Page ID #21569, 21576-78, 21580-85, 21587-89); and ultimately found it satisfied based on the large remaining cushion and exceptional reliability of the IA's projections to date (*id.* Page ID #21586-89). The District Court correctly rejected Dow Corning's attempt to transform the standard from "virtual" to "absolute" certainty. *Id.* Page ID #21585. Once again, Dow Corning identifies no legal issue, much less error.

4. The District Court Did Not Improperly Shift the Burden of Proof or Exclude Dow Corning's Expert Evidence

In a last-ditch effort to convert factual disagreements into legal issues for appeal, Dow Corning argues that the District Court improperly shifted the burden of proof and failed to consider Dow Corning's expert evidence, in violation of this Court's prior ruling. App. Br. 40-43. Both arguments are baseless.

First, while the SFA does not put a particular burden of proof on any party, the District Court's decision is based on years of work by the IA, presented by the Finance Committee in support of its Recommendation, and further supported by detailed expert evidence and arguments from the CAC. The core of the District Court's analysis is its summary of the Finance Committee and CAC arguments that it found persuasive in establishing a "virtual guarantee" of funding adequacy. *See* RE 1346, Page ID #21584-85, 21587-89. Among other things, the detailed declarations submitted by the CAC's expert, Dr. Mark Peterson (together

with the IA's analysis submitted by the Finance Committee) amply meet any burden of proof that the proponents of the Recommendation might bear. *See* above at 13-17, below at 43-45.

The portions of the Order that Dow Corning cites as evidence of improper burden-shifting (RE 1346, Page ID #21587-88) make no reference to burden of proof – they simply show the District Court discussing and rejecting certain of Dow Corning's arguments. In pointing out that Dow Corning failed to offer any alternative methodology for projecting future claims, or any relevant epidemiological data, the District Court hardly shifted the burden of proof. It merely observed that Dow Corning offered no good answer to the overwhelming showing in support of the Recommendation, before affirmatively finding a "virtual guarantee" based on the huge residual funding cushion. *Id.* Page ID #21588-89.

Nor did the District Court violate this Court's mandate by allegedly failing to "consider the relevant expert evidence that was provided." App Br. 41. As required by this Court's prior ruling, all parties had an ample opportunity to submit expert evidence, and Dow Corning took advantage of that by submitting *four* expert declarations, which the District Court considered. The CAC submitted two, by Dr. Peterson, refuting Dow Corning's experts. The District Court weighed all the evidence and arguments and found the CAC's submissions more persuasive. That is all the law requires. *See United States v. Darwich*, 337 F.3d 645, 664 (6th

Cir. 2003) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (citation omitted); *United States v. Navarro-Camacho*, 186 F.3d 701, 707-08 (6th Cir. 1999) ("[A]s an appellate court, we do not reweigh the evidence presented below for the purpose of determining which scenario has the greater possibility of being true. The job of weighing the evidence belongs to the trial court . . . .").

Once again trying to transform factual disagreements into cognizable legal error, Dow Corning catalogues allegedly "erroneous[]" (App. Br. 41-42) statements in the Order supposedly revealing that the District Court failed to consider the proffered evidence – but each example demonstrates merely that the District Court rejected Dow Corning's expert evidence on the merits:

- The District Court's statement that "Dow Corning offers no scenario analysis by its experts as to how the Independent Assessor's projections could be off by $300 million" (RE 1346, Page ID #21585) is accurate. Mr. Hinton recited variations in certain assumptions that could cause costs to be "higher" or "decrease" the surplus. RE 1308, under seal, ¶ 48. But he did not explain how these variations could consume a $300 million cushion. He then calculated the percentage of outstanding claimants who would have to surface with valid claims in order to expend the entire surplus. *Id.* ¶¶ 49-50. This is mere multiplication, not a plausible scenario explaining *how* the most

conservative upper range estimate of 1,567 new valid claims could suddenly turn into 10,000.

- The District Court's statement that "Dow Corning's experts do not criticize the Independent Assessor's application of its methodology" (RE 1346, Page ID #21586) is also accurate. Mr. Hinton's principal submission was a conclusory, eight-page declaration arguing generally that projections can never support a finding of virtual guarantee and categorically attacking the IA's methodology for failing to include an error rate analysis or epidemiology. RE 1287-2, Page ID #20112-19. His 20-page Reply Declaration (RE 1308, under seal) mainly just elaborated on these themes. In contrast, Mr. Hinton's initial 2011 submission, dumped into the record this time as an exhibit to the Reply Declaration, ran 65 pages – describing myriad alleged errors and irregularities in the IA's *application* of the methodology in 2011 and purporting to show how small changes in assumptions could alter the outcome. Mr. Hinton's failure in his *current* declarations meaningfully to critique *application* of the methodology implicitly concedes that no reasonably foreseeable variations could threaten the $300 million cushion.
- The District Court's statement that "Dow Corning does not submit any expert testimony analyzing the similar MDL-926 RSP, where the

Independent Assessor's projections could be better compared" (RE 1346, Page ID #21586) accurately notes Dow Corning's failure to come to grips with the fact that the RSP – which concerned breast implants and an overlapping population – wrapped up several years ago after fifteen years of accepting claims with only a modest bump in paid claims. *See* above at 16 n.8. Dow Corning claims that its expert addressed the RSP "in detail" (App. Br. 42), but cites only to a *single conclusory paragraph* in Mr. Hinton's Reply Declaration (RE 1308, under seal, ¶ 14) that did not meaningfully respond to Dr. Peterson's characterization of the RSP (RE 1286-4, under seal, ¶ 17).[11]

- Finally, the District Court's statement that "claim filing has slowed considerably and Dow Corning has not rebutted with any expert testimony that this trend will dramatically reverse course" (RE 1346, Page ID #21588) is correct. This statement does not ignore the claim surge typically expected at the filing deadline (App. Br. 42-43), which the District Court

[11] Dow Corning also cites to a few paragraphs in Mr. Hinton's *2012* Supplemental Declaration, attached to his 2017 Reply Declaration (RE 1308) as Ex. 2, discussing the RSP in somewhat greater, though misleading, detail. If the Court is inclined to go down that rabbit hole, Dr. Peterson refuted Mr. Hinton's 2012 assertions about the RSP in his own Supplemental Declaration. RE 867, under seal, ¶¶ 11-20. Among other things, Dr. Peterson refuted Mr. Hinton's unfounded assertion that the increasingly elderly and dying Dow Corning claimants will somehow start to claim at higher rates than the RSP claimants as they continue to age. *Id.* ¶¶ 21-27.

acknowledged (RE 1346, Page ID #21576) and is already factored into the IA's projections (*see* above at 15-16). Rather, the court was referring to Dow Corning's failure to provide any basis to expect a surge so unexpectedly massive as to consume the entire remaining cushion.

In short, the District Court did not fail to "consider" Dow Corning's expert evidence – it simply did not find it persuasive. This does not present an issue of legal error for appeal.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN HOLDING THAT ADEQUATE FUNDING WAS VIRTUALLY GUARANTEED

Stripped of invented "legal" issues, Dow Corning's objection to the Order boils down to a refusal to accept the reality that there is simply too little time remaining and too much money left over for any conceivable last minute surge to threaten the funding cap. At minimum, the ample record supporting this conclusion defeats any assertion that the Order was clearly erroneous.

A. The Evidence Overwhelmingly Establishes Funding Adequacy

As described above at 13-17, the District Court's "virtual guarantee" holding is supported by a solid and not meaningfully contested factual record:

First, the IA applied a well-established methodology of extrapolating future claim projections from past filing history. This method, mandated in the SFA, is the same one used by Dow Corning's expert Fred Dunbar to establish Plan viability and in other, similar settlements like the RSP and the Dalkon Shield case.

Indeed, it is the *only* generally recognized and available methodology for projecting future claims within a closed universe of self-selected claimants not representing a random sample of the population. *See* Peterson Decl. (RE 1286-4, under seal) ¶ 5; Peterson Reply Decl. (RE 1306-1, under seal) ¶ 3.

Second, the IA's methodology embodies a series of conservative assumptions that make it likely that the cushion will be *larger* than shown in the Final IA Report. Among other things, the IA assumes that claim filings will remain constant rather than decay (prior to a final surge); that every claimant with a valid POM will receive either a disease or an expedited payment; that all "scenarios" will be resolved in favor of increasing the Trust's liability or decreasing its resources; that every eligible claimant will apply for and receive an Option 2 increased severity payment; and that the final disease claim surge will be similar to the one accompanying the 2006 rupture claim deadline, even though several factors suggest the surge should be more modest. *See* Final IA Report (RE 1279-2, Page ID #19735-38, 19740-41, 19757, 19785); Peterson Decl. (RE 1286-4, under seal), ¶¶ 21-28; Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 6-7.

Third, the IA's projections have proven exceptionally reliable over the years, almost always running significantly higher than actual claims experience, which the IA has used to continually fine-tune its projections. Claims have declined significantly as the breast implant tort has matured, despite the IA's

adherence to the "constant" model of claim projection. Most claimants with valid POMs have already filed their claims. *See* Peterson Decl., (RE 1286-4, under seal), ¶¶ 7-16; Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 3, 6-10, 12-13.

Fourth, several other confirmatory factors support the conclusion that deviations from the IA's projections are more likely to be downward – acting as a further hedge on any unexpectedly high final claim surge. Among other things, (1) the experience of the RSP, in which a modest final surge contained many unmeritorious "protective" claims, makes it exceedingly unlikely that the same population will suddenly generate thousands of new meritorious claims a decade later at the Dow Corning deadline; (2) this is so, among other reasons, because (contrary to Mr. Hinton's unsupported assertion) claimants tend to file fewer claims as they age, and the claims in question here are more than a quarter century old and growing staler by the minute; and (3) most of the remaining claimants are pro se or their attorney's only client, categories that file claims at a much lower rate than those represented by attorneys with multiple clients. *See* Peterson Decl. (RE 1286-4, under seal), ¶¶ 10, 17-20, 27; Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 10, 12-15.

Finally, as explained above, only a single variable – the number of new disease claims filed in the final months of the settlement – could even *potentially* result in significant unexpected liability for the Trust. In view of the

factors summarized above, the odds of a last minute explosion of upwards of 10,000 new, meritorious disease claims is so far-fetched that it is "almost impossible to contemplate a scenario where it could be $300 million higher than projected." Peterson Decl. (RE 1286-4, under seal), ¶ 28; *see also* Peterson Reply Decl. (RE 1306-1, under seal), ¶ 7 (chance of projections "being off by $300 million is near zero").

In short, as demonstrated by the Final IA Report and confirmed by Dr. Peterson's declarations, ample record evidence supported the District Court's conclusion that 50% of Second Priority Payments could be authorized while still virtually guaranteeing the payment of all future base claims. Dow Corning's arguments to the contrary, weak in 2011, border on frivolous in 2018.

B. Dow Corning's Continuing Attempts to Create Uncertainty Lack Any Basis in the Record

As it did in 2011, Dow Corning attacks the IA's methodology as fundamentally unreliable and based on inherently uncertain assumptions. App. Br. 16-19, 29-34. But as explained in both of Dr. Peterson's Declarations, the IA employs the customary and accepted method of projecting the number and cost of future claims in a closed-population mass tort claims facility, and Dr. Dunbar used essentially the same methodology to establish the viability of Dow Corning's Plan. *See* above at 9-10.

In any event, Dow Corning's claim of unreliability is demonstrably *false* based on more than a decade of actual experience. The IA's forecasts have been consistent, reliable, and *conservative*. Indeed they have always, deliberately, been too *high* – intentionally erring on the side of protecting Dow Corning and avoiding any risk of a shortfall. Whatever doubt Dow Corning might have tried to foster in this regard in 2011 has been even more thoroughly refuted by recent experience.[12] Looking forward, Dow Corning offers no reasonable ground to question the continuing reliability of the IA's projections – much less to expect a liability explosion that could conceivably consume the huge remaining funding cushion. None of Dow Corning's further arguments establish that the District Court's "virtual guarantee" finding was clearly erroneous.

1. Neither Reliance on Assumptions Nor Boilerplate Disclaimers Undercut the Reliability of the IA's Projections

To create an impression of uncertainty, Dow Corning suggests that the IA's conclusions would be sustained only if "all of its 85 assumptions prove to be correct." App. Br. 33. But this is a misleading (and frankly silly) description of

[12] In 2011, the IA projected base claim payments for the next five years totaling $296.8 million, but actual payments were only $101.3 million (and *each year's* total ran below projections). Even adding in the $92.2 million in 50% Premiums paid prior to this Court's 2015 ruling brings the total for that five years to only $193.5 million. *See* RE 1306, under seal, Report of Independent Assessor End of Fourth Quarter 2010, Preliminary Report May 20, 2011 at 76; RE 1279-2, Page ID #19805.

the claim projection process. Each element of a projection is, by its nature, subject to some variation and uncertainty. It is neither possible nor necessary, for example, to prove that there will be precisely 1,836 more disease claims filed. In the end, there will probably be substantially fewer – but it is also possible that there will be somewhat more. The Final IA Report takes into account a wide range of such variables, filtered through several highly conservative assumptions. It is thus probable that any upward deviations from projections will be offset by downward ones. But even if the net result is an increase over the total liability projected for the Trust in the Final IA Report (which has *never* occurred over more than a decade of projections), there remains a $300 million margin for error that will be more than ample in all but the most far-fetched circumstances. As the District Court correctly observed, *only that final conclusion about the overall adequacy of funding needs to satisfy the "virtual guarantee" standard*. RE 1346, Page ID #21587-88.

Dow Corning further stresses the existence of approximately 70,000 registered claimants who have not yet filed a claim. It portrays the IA's methodology as simplistically based on the assumption that "the characteristics of the remaining population . . . are precisely the same as those of the population . . . who filed claims" over the last 18 months and chides the IA for supposedly failing to "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 filing." App. Br. 17.

None of these criticisms is valid. The remaining pool is mostly individuals who filed proofs of claim *20 years ago* and have taken *no* action since then to file a POM or benefit claim, despite receiving repeated notices over many years. Most of these claims will remain dormant, as is the experience in most mass tort claim processes, for several reasons: Some claimants have died; others have lost touch with the SF-DCT, or lost interest, or do not qualify for a substantial claim; and still others filed POCs but turned out not to have Dow Corning implants. *See* Peterson Decl. (RE 1286-4, under seal), ¶¶ 7-10; Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 9-10.

In any event, Dow Corning's criticism is ironic because the IA indeed takes account of empirical evidence about *changes* in claimant behavior by including projections based on a decay as well as a constant model (and then erring in favor of Dow Corning by focusing on the more conservative constant model) and tracking characteristics of the remaining population that are (based on experience in this and other mass torts) highly predictive of claiming behavior, including age, years elapsed without claiming, and representation status. *See* Peterson Decl. (RE 1286-4, under seal), ¶¶ 18-21; Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 13-15.

Lacking any basis actually to posit that the projections could be off by $300 million, Dow Corning cites various cautions and qualifications in the Final IA Report as supposed evidence that the methodology is unreliable. App. Br. 30-31. But this is merely boilerplate disclaimer language reflecting that *all* projections embody some uncertainty. Moreover, in view of the Finance Committee's request that the IA opine on "virtual guarantee," it was reasonable for the IA to make clear that it was not *itself guaranteeing* that its projections would be perfectly accurate in every respect. That was not and is not its task or responsibility.[13]

Ultimately, the mere existence of a large pool of inactive POC filers is no barrier to the necessary assurance finding. Indeed, *Dow Corning always contemplated paying Premiums while thousands of claims remained unresolved.* That was an important part of the deal on which the CAC linked arms with Dow

[13] Dow Corning suggests that the District Court's approval of the form of notice of the claim filing deadline, RE 1342, which was "not in place at the time of the IA Report," creates additional uncertainty. App. Br. 30-31. But additional notice to claimants regarding conclusion of the settlement program has long been anticipated and a claims "bump" based on the final deadline is built into the IA's projections. However, if the Court is inclined to go outside the motion record in assessing the reliability of the IA's projections, there is available an entire additional year of data, embodied in the IA's Final Report dated December 15, 2017, showing no material change in claim filing and an even larger cushion, with one fewer year of future risk remaining. *See* RE 1374, under seal, at 18 (based on claims data through June 2017, projecting $103.8 million NPV cushion after 50% Second Priority Payments).

Corning and urged claimants to vote for its Plan. Dow Corning should not be permitted to change that bargain and render its Plan solicitation a lie by categorically barring any further Second Priority Payments until the end of the settlement program. "Virtual guarantee" must be read to permit Premiums to be paid, despite a pool of remaining POCs, when it is clear to a high (but not absolute) level of certainty that adequate funds will be available to pay all base claims. We are well past that point today.

2. Epidemiology Cannot Be Used to Predict Claims in a Closed Universe and in Any Event No Relevant Data is Available Here

Dow Corning further faults the IA for failing to base its projections on epidemiology (App. Br. 17, 32-33), but this is a total red herring. As Dr. Peterson has repeatedly explained, epidemiology cannot validly be used to predict disease incidence within a self-selected, registered claimant group not representative of the general population (and from which most meritorious claimants have already been removed). And even if it could be, no valid epidemiology even exists for the most common compensable conditions under this settlement, including Atypical Connective Tissue Disease. *See* Peterson Reply Decl. (RE 1306-1, under seal), ¶¶ 16-23; *see also* Peterson 2011 Decl. (RE 848-2), ¶¶ 57-62; Peterson 2012 Decl. (RE 867, under seal), ¶¶ 5-7.

Although Dow Corning did not identify in its opening brief any relevant epidemiology that it believes the IA inappropriately ignored, Mr. Hinton's Reply Declaration below set forth raw data about the prevalence of certain signs and symptoms in the general population. RE 1308, under seal, ¶¶ 32-39. But this information is useless, as it (1) does not relate to the specific population of remaining claimants; (2) is not tied to specific compensable conditions; and (3) does not assess degree of disability, a crucial part of disease claim criteria. Mr. Hinton's attempt to argue anything from this data is nothing more than junk science. *See* Peterson 2011 Decl. (RE 848-2), ¶¶ 60-62.

In any event, Dow Corning fails to identify *any* epidemiological evidence that would materially *change* the IA's projections. The one concrete example Mr. Hinton cites – a single epidemiological study regarding lupus – is in no way inconsistent with the IA's projections. *See* RE 1308, under seal, ¶ 38 n.24. Mr. Hinton fails to establish, at the threshold, that this study applies a definition of lupus consistent with medical and other eligibility requirements under the Plan. He argues that the study supports the likelihood of 90 additional approved lupus claims, but does not establish that this would be surprising given the 1168 lupus claims already paid under the settlement (RE 1279-2, Page ID #19775) or inconsistent with the IA's projections, much less threaten the funding cap. Dow

Corning has not cited any other epidemiology that it says would have altered the IA's projections.

What little epidemiology appears to be available tends to confirm, rather than undercut, the reliability of the IA's projections. For example, the Finance Committee cited below published studies suggesting that certain of the more serious (and high valued) compensable conditions (including Sjoren Syndrome/Systemic Lupus Erythematous and Scleroderma) tend to manifest in patients younger than 50, while 90% of potential remaining claimants are 55 or older. RE 1316, Page ID #20981-82. While the CAC does not believe that such studies, standing alone and unaccompanied by qualified expert opinion, are independently probative of likely future claims experience, they are nevertheless broadly consistent with the IA's projections, and, more particularly, with the common experience in claims facilities that aging populations tend to generate fewer claims. *See also* 2011 Peterson Decl. (RE 848-2), Page ID #14376-79, ¶¶ 45-52; Peterson 2012 Decl. (RE 867, under seal), ¶¶ 21-27.

3. The District Court Did Not Clearly Err In Finding the RSP a More Relevant Precedent Than The Other Mass Tort Claim Resolution Processes Dow Corning Prefers to Discuss

As noted above (at 16 n.8), the closely related RSP, involving breast implants and a significantly overlapping population, ended nearly a decade ago with only a modest final surge in paid disease claims. The District Court did not

clearly err in crediting Dr. Peterson's view that this is the most relevant precedent and provides comfort that the Dow Corning settlement also will end with a whimper rather than a bang. RE 1286-4, under seal, ¶ 17.

The examples that Dow Corning prefers to discuss regarding claim surges in vastly different circumstances do not cast any meaningful doubt on the projections here. Dow Corning notes that the Agent Orange settlement experienced a substantial surge in claims in the year before the final deadline. App. Br. 31-32. But that followed a massive national publicity campaign involving 10,000 daily and weekly newspapers and 6,000 radio stations. Hinton 2011 Decl. (RE 1308, Ex. 1 to Ex. A, under seal) ¶ 76. No such campaign remains to be conducted in this case, and Dow Corning fails to explain how the highly charged and politicized Agent Orange litigation provides a reasonable parallel to this mature mass tort, which has been winding down for years.

Even more remarkably, Dow Corning invokes the September 11th Victim Compensation Fund, in which almost half of the total claims were filed on or near the December 22, 2003 eligibility deadline. App Br. 32; Hinton 2011 Decl. (RE 1308, Ex. 1 to Ex. A, under seal) ¶ 78. Mr. Hinton did not explain what conceivable relevance that example could have here, given the obvious differences between this mature tort and the traumatic circumstances and political and

litigation pressures driving events barely two years after the horrific September 11 attacks.

Finally, Dow Corning offers another weak argument, which it raised in 2011 but abandoned on the prior appeal, based on the opinion of Professor Georgene Vairo that the Dalkon Shield trustees would not have authorized lower priority payments based on the projections embodied in the IA's reports. RE 1287-4 (incorporating by reference RE 826-7, "Vairo 2011 Decl."). But the Dalkon Shield settlement required that all current claims *and* all meritorious late claims *actually be paid in full* before the Trust could authorize pro rata distribution of surplus funds in lieu of punitive damages. Vairo 2011 Decl. (RE 826-7), Page ID #13435, ¶ 19. It thus is not surprising – but of no relevance here – that the Dalkon Shield Trustees required that all claims be either paid or *submitted and valued* before bending the rules of their settlement to issue pro rata payments. *Id.* Page ID #13438, ¶ 25. This was not "effectively the same" as the standard under Section 7.03, as Dow Corning misleadingly suggests (App. Br. 33); rather the Dalkon Shield Trustees acted only when they were *actually*, not virtually, "certain . . . under a *worst case* scenario." *Id*. Page ID #13438, ¶ 24.

Dow Corning's invocation of such far-afield cases while largely ignoring the directly relevant – and highly reassuring – example of the RSP only underscores the result-driven and disingenuous nature of its entire appeal.

CONCLUSION

For the reasons stated above, the Order should be affirmed.

Dated: May 1, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation 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 12,911 words.

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CERTIFICATE OF SERVICE

I certify that on May 1, 2018, I electronically filed a copy of the foregoing Brief of Appellee Claimants' Advisory Committee with the Clerk of the Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-0005)

Record Entry	Filing Date	Description	Page ID
826-7	11/11/2011	November 10, 2011 Declaration of Georgene M. Vairo	13427-13441
848-2	12/23/2011	December 23, 2011 Declaration of Mark Peterson	14348-14397
867	1/30/2012	January 30, 2012 Supplemental Declaration of Mark Peterson	NA (sealed)
1279	12/30/2016	Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	19674-19683
1279-1	12/30/2016	Settlement Facility and Fund Distribution Agreement dated June 1, 2004	19685-19724
1279-2	12/30/2016	October 18, 2016 Final Report of Independent Assessor - End of Second Quarter 2016	19726-19816
1285	2/10/2017	Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make 50% Second Priority Payments	19996-20016
1285-2	2/10/2017	Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization	20019-20021
1285-3	2/10/2017	Excerpt of Deposition of Dr. Frederick Dunbar dated June 29, 1999 in *In re Dow Corning Corporation*, No. 95-20512 (E.D. Mich.)	20023-20025
1285-4	2/10/2017	Dow Chemical Company Form 8-K dated December 17, 2014	20027-20030

Record Entry	Filing Date	Description	Page ID
1285-5	2/10/2017	Dow Chemical Company Form 10-Q for the quarterly period ended June 30, 2016	20032-20035
1286	2/10/2017	Settlement Facility Dow Corning Trust Summary of Monthly Department Reporting, December 2016	NA (sealed)
1286-1	2/10/2017	Final Report on Claims Processing in the Revised Settlement Program dated February 21, 2014	NA (sealed)
1286-2	2/10/2017	DCT Liability Model June 2016 Data Extract	NA (sealed)
1286-3	2/10/2017	Independent Assessor Response to Claimants' Advisory Committee dated November 4, 2016	NA (sealed)
1286-4	2/10/2017	February 10, 2017 Declaration of Mark Peterson	NA (sealed)
1287	2/10/2017	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	2/10/2017	February 10, 2017 Declaration of Paul J. Hinton	20112-20126
1287-3	2/10/2017	February 10, 2017 Declaration of Jonathan Rosen	20128-20136
1287-4	2/10/2017	February 10, 2017 Declaration of Georgene M. Vairo	20138-20153
1305	3/15/2017	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

Record Entry	Filing Date	Description	Page ID
1305-2	3/15/2017	Report of National Economic Research Associates	20322-20341
1306	3/15/2017	Report of Independent Assessor for End of Q4 2010 dated May 20, 2011	NA (sealed)
1306-1	3/15/2017	March 15, 2017 Reply Declaration of Mark Peterson	NA (sealed)
1307	3/15/2017	Reply of Dow Corning Corporation and the Debtor's Representatives to the Response of the Claimants' Advisory Committee to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	20369-20387
1308	3/15/2017	March 15, 2017 Reply Declaration of Paul J. Hinton	NA (sealed)
1316	4/27/2017	Supplemental Brief to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	20960-20985
1322	5/17/2017	Response of Claimants' Advisory Committee to Supplemental Brief to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	21332-21345
1323	5/17/2017	Response of Dow Corning Corporation and the Debtor's Representatives to the Supplemental Brief to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	21346-21368
1342	12/27/2017	Stipulation and Order Approving Notice of Closing and Filing Deadline for Claims	21544-21545

Record Entry	Filing Date	Description	Page ID
1346	12/27/2017	Memorandum Opinion and Order Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments	21562-21589
1374	2/1/2018	Report of Independent Assessor for End of Q2 2017 dated December 15, 2017	NA (sealed)