UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

REPLY OF CLAIMANTS' ADVISORY COMMITTEE IN FURTHER SUPPORT OF FINANCE COMMITTEE'S FIRST AMENDED RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE PARTIAL PREMIUM PAYMENTS

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The CAC[1] submits this reply in further support of the Finance Committee's Recommendation and respectfully states as follows:

Preliminary Statement

To induce breast implant claimants to settle under its Plan, Dow Corning promised them rupture payments of $25,000 and disease payments of up to $300,000, a portion of which were designated as premiums that would be delayed for a few years until adequate funding could be confirmed. Dow Corning further agreed that the determination of adequate funding should be made by the Finance Committee and informed by projections prepared by ARPC based on an analysis of past claim payment history. Dow Corning has participated along with the CAC and Finance Committee in ARPC's claims analysis process every year since the Plan went into effect and has never, before now, suggested that the agreed-upon approach and methodology were inadequate to support the eventual authorization of Premium Payments.

[1] Terms are abbreviated as they were in the Response of Claimants' Advisory Committee to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments (the "CAC Response") and the Opposition of Dow Corning Corporation, the Debtor's Representatives and the Shareholders to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments (the "DCC Opp.").

The two responsible fiduciaries charged with balancing the interests of current and future tort claimants – the Finance Committee and the CAC – have now concluded that adequate assurance exists that all future First Priority Payments, plus 50 percent of accrued and future Premium Payments, can be safely satisfied within the funding cap. These determinations are entitled to significant weight. Dow Corning, in contrast, has no duty to claimants and only one purpose here: to delay indefinitely its obligation to make payments to the Trust. Its professed concern for the interests of future claimants – and its strained attempts to avoid the inevitable conclusion that ample funding exists – are entitled to little weight or credibility.

At the outset, the Court's recent ruling on the Time Value Credit ("TVC") dispute[2] adds approximately $273 million NPV to the available funding cushion, effectively ending any debate about the adequacy of the Settlement Fund to support partial – or even full – premiums. But even leaving aside this huge additional cushion, Dow Corning's arguments against the Recommendation should be rejected.

First, Dow Corning argues that Premium Payments may not be authorized unless payment of future base claims is "virtually guaranteed." DCC Opp. 11. But the SFA expressly requires only that "adequate" provision has been made to assure payment, and, accordingly, Dow Corning's Disclosure Statement expressly told claimants that premiums would be released when "payment of First Priority Payments is *adequately* assured." Disclosure Statement at 4 n.3 (emphasis added). Dow Corning's "virtually guaranteed" standard is based on authorities construing the word "assurance" in a completely different context: commercial agreements where the term is used as a synonym for "guarantee" – i.e., as a *promise* rather than as a *forecast* of future ability to pay, the sense in which it is used in the Plan. The "adequate assurance"

[2] *See* Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents ("TVC Order"), dated November 28, 2011 (Docket No. 836).

language of Bankruptcy Code Section 365(b)(1)(C) uses the term in the latter sense and thus provides a better analogy for the applicable inquiry here – setting a standard requiring a *probability* but not a *certainty* of sufficient funding.

Second, Dow Corning argues that the type of methodology ARPC employs of projecting a likely range of future claims based on past claims history is fundamentally unreliable and must now be supplemented with other types of analysis, including review of epidemiological data about the underlying population. But ARPC's methodology is not only specifically required by the Plan documents, it is the same methodology that Dow Corning's own expert, Frederick Dunbar, used to convince the Bankruptcy Court that Dow Corning's funding commitment would be sufficient to satisfy all claims (thus justifying, among other things, the releases sought by the shareholders). Dow Corning stresses that ARPC's methodology inevitably involves some uncertainty, but that is consistent with the parties' understanding – expressly conveyed to claimants voting on the Plan – that premiums would be paid part-way through the life of the Settlement Facility, at a point when absolute certainty in projections would obviously be impossible. The accompanying Declaration of Mark Peterson ("Peterson Decl.") (attached hereto as Ex. A) confirms that ARPC has applied an appropriate and customary methodology in a reliable and conservative manner.

Third, Dow Corning's specific criticisms of ARPC's work as untested and unreliable (answered in detail in the Peterson Declaration) ignore both a multi-year track record confirming the reasonableness of ARPC's projections and the simple, undeniable reality that claims in the Settlement Facility have slowed to a relative trickle and are winding down. Dow Corning tries to position ARPC's projections as if they were the most optimistic case and then dreams up multiple potential factors (several of them facially unrealistic) that it says could cause claims to go higher. Dow Corning ignores the myriad conservative assumptions built into the

ARPC projections that make *downward* departures far more likely than any sudden, unexplained net surge in claims – and years of consistent experience confirms that expectation. Significantly, none of the three experts Dow Corning offers to opine against authorization of premiums discusses in any way ARPC's work product prior to the May 2011 IA Report.

Finally, Dow Corning argues that experience from other mass torts counsels a conservative approach, but fails to articulate any meaningful parallels between its examples and the current case. For example, the initial underestimation of Diet Drug claims, which became apparent within two years, has zero relevance for this tort, which is now at a very mature stage after 15 years of claims resolution in the MDL and more than seven years in the SF-DCT. Dow Corning's principal argument, based on the Dalkon Shield settlement, ignores a crucial distinction: that settlement provided for residual pro rata payments to be made *only after all claims had actually been processed and paid*. It is not surprising that the Dalkon Shield trustees, before authorizing pro rata residual payments earlier than was actually permitted under that plan, insisted on near certainty in quantifying the remaining unpaid claims. In contrast, Dow Corning claimants were expressly told that they would be paid premiums *during* the life of the Settlement Facility, *before* all claims had been paid, based simply on a *projection* that enough funds would be available to cover future base claims. The differences between the two settlements only highlights the reasonableness of the Finance Committee's current Recommendation.

Argument

I. THE COURT'S RECENT TVC RULING PROVIDES A VASTLY INCREASED CUSHION THAT SUPPORTS IMMEDIATE PAYMENT EVEN OF FULL PREMIUMS

In the recent TVC Order, this Court addressed Dow Corning's request for approximately $370 million in credits to reduce the amount available under the Settlement Fund cap. ARPC's projections, and the Finance Committee's Recommendation, had been based on

the conservative assumption that Dow Corning would prevail on its entire TVC claim. However, the Court sustained only those claimed credits specifically provided for in the Plan documents, totaling approximately $97 million. The rejected credits effectively add approximately $273 million NPV to the $68 million NPV cushion projected by ARPC based on the payment of 50 percent premiums. With this vastly increased cushion, the Court could safely authorize *full* premiums even if it were to credit every one of Dow Corning's speculative liability scenarios. Once the TVC Order becomes final, it will effectively end the debate about the adequacy of funding to support Premium Payments.

However, since Dow Corning will likely appeal the TVC Order, the Court may wish to consider the adequacy of funding, in the alternative, based on the Finance Committee's more conservative original assumption giving Dow Corning credit for all claimed TVC adjustments. As demonstrated below, even without the additional cushion provided by the TVC Order, adequate assurance exists that 50% premiums will not threaten the Settlement Fund cap.

II. THE PLAN REQUIRES ONLY REASONABLE OR ADEQUATE ASSURANCE OF SUFFICIENT FUNDING, NOT A "GUARANTEE"

Dow Corning's suggestion that premiums may not be authorized until adequate funding to pay all future base claims is "virtually guaranteed" (DCC Opp. 11) is inconsistent with the plain language of the Plan documents, as well as the parties' overall intent and purpose as expressed by the structure of the Premium Payment provisions and in communications to claimants being asked to vote on the Plan.

As explained in the CAC Response at 4-5, Premium Payments may be authorized upon a finding "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." SFA § 7.01(d). Dow Corning would pluck the word "assure" out of context (ignoring the modifying

term "adequate") and, applying one dictionary definition, treat the word as synonymous with "pledge" or "guarantee." *See* DCC Opp. 7 & n.5. Dow Corning thus cites to old New York commercial cases using the word in the specific context of a *promise* of future payment. *See, e.g., Utilities Eng'g Inst. v. Kofod*, 58 N.Y.S.2d 743, 744-45 (N.Y. Mun. Ct. 1945) (holding that written "personal assurance" that judgment would be paid was understood by parties as constituting a "guaranty"); *National Watch Co. v. Weiss*, 163 N.Y.S. 46, 47-48 (N.Y. Sup. Court) (interpreting language of "personal guaranty" in which party "used the words 'personal assurance' in the sense of personal agreement or personal contract," i.e., "as synonymous with pledge, guaranty, or surety"), *aff'd*, 166 N.Y.S. 1104 (N.Y. App. Div. 1917).

Such cases do not control here, because the meaning of a word or phrase depends on the context in which it is used. *See Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991) (court below erred in considering contract term "in isolation" rather than basing definition on "clarifying context" of entire contract). Contract language must be read to effectuate the goal of the overall agreement consistent with the purposes and understanding of the parties. *See Winnett v. Caterpillar Inc*., 553 F.3d 1000, 1008 (6th Cir. 2009). Here, the word "assure" is used not in the context of a particular party's *promise* of future payment, but rather in connection with a *projection* or *prediction* that adequate funding will be available in administering the SF-DCT. Thus, a more appropriate analogy is provided by cases considering whether there has been "adequate assurance" of future performance of a contract assumed under Section 365(b)(1)(C) of the Bankruptcy Code – a standard far short of a guarantee. *See* CAC Response 16-17; Recommendation 6-7.

The plain language of the SFA does not require "assurance" in a vacuum, but rather a finding that "*adequate* provision has been made to assure" payment of all claims. SFA § 7.03(a) (emphasis added). Reading this language as requiring "adequate" or "reasonable"

assurance is consistent with other provisions of the SFA. For example, as Dow Corning acknowledges (DCC Opp. 5), SFA § 7.01(d) requires the Finance Committee to prepare quarterly projections of the "*likely* amount of funds required to pay in full all pending, previously Allowed but unpaid and projected First Priority Payments" as well as "claims and expenses subject to the Litigation Fund" (emphasis added). This language reflects an understanding that the parties must rely on projections establishing likelihood rather than certainty. Indeed, the very terms "projection" (*see* SFA § 7.01(d)) and "assessment" (*id*. § 405) imply a degree of inevitable uncertainty.[3] Moreover, SFA § 7.01(c)(v) grants the Finance Committee discretion with Court approval to pay lower priority payments and higher priority payments contemporaneously, so long as the ability to make timely payments of higher priority claims is "*reasonably* assured" (emphasis added).[4]

Indeed, Dow Corning's own Disclosure Statement specifically told tort claimants being asked to vote on the Plan that Premium Payments would be made "if funds are available after payment of all First Priority Payments is *adequately* assured." Disclosure Statement at 4 n.3 (emphasis added) (excerpts attached here to as Ex. B). This language was included in an introductory "Plan Overview" section setting forth the basic elements of the settlement claimants

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[3] *See, e.g.*, Merriam-Webster's Collegiate Dictionary (11th ed.) (defining "projection" as "an estimate of future possibilities based on a current trend); Cambridge Dictionary of Business English (online edition) (defining "assessment" as "the process of considering all the information about a situation and making a judgment") (*available at* http://dictionary.cambridge.org/dictionary/business-english/assessment?q=assessment).

[4] Dow Corning suggests that this provision actually supports *its* reading of § 7.03(a), arguing that the *timing* of approved payments is less crucial than the initial authorization to pay premiums and that the Court thus should attach significance to the omission of the word "reasonably" from § 7.03(a). DCC Opp. 10. But both provisions serve the same purpose of preventing the payment of lower priority claims from interfering with the payment of higher priority claims. The slight difference between "adequate" provision to assure and "reasonably" assure does not suggest an intent to impose different meanings. N.Y. Stat. Law § 236 (McKinney) (2011) (noting "presumption" that "similar meaning . . . attaches to the use of similar words").

Dow Corning's further citation to the unrelated statement that the Settlement Facility is intended to "assure that the Trust qualifies as a Qualified Settlement Fund" under the Internal Revenue Code (DCC Opp. 10 n.12) simply demonstrates that the word "assure" can be used differently in different contexts.

were being asked to ratify in the Plan. If Dow Corning believed there was a meaningful difference between "adequate provision . . . to assure" and "adequately assured" then the Disclosure Statement was materially misleading. Significantly, Dow Corning recognizes that this advertised standard of "adequate assurance" is "substantially more lax" than one of absolute "assurance." DCC Opp. 8-9 n.8.

Dow Corning's "virtually guaranteed" standard is also inconsistent with the basic structure of the Plan as described to claimants and presented at confirmation. The parties always contemplated that premiums would be paid after a delay of only a few years, well *before* conclusion of the sixteen-year settlement program – an expectation that, in and of itself, precludes enforcement of a "virtually guaranteed" standard. Contrary to Dow Corning's argument (DCC Opp. 18 n.18), Dr. Dunbar did not merely use seven years as an arbitrary marker to project cash flows – he affirmatively testified at confirmation that premiums "are going to be paid seven years from now." June 29, 1999 Tr. at 303 (excerpts attached hereto as Ex. C). Dr. Dunbar offered this testimony not in the context of cash flow projections but to defend his assumption that "more women are more likely to accept the settlement offers in the Dow Corning joint plan than actually accepted in the RSP" because the Dow Corning Plan offered "enhanced" benefits – including, significantly, Premium Payments *Id.* at 46, 51. Dr. Dunbar's testimony about the timing of premiums was in the context of cross-examination suggesting that a delay of *as much as* seven years undercut his reliance on the premiums as an incentive for claimants to settle. *Id.* at 303-04.

Dr. Dunbar's testimony was consistent with how the settlement options were presented to claimants. The Plan and Disclosure Statement were mailed out with a four-page, plain language document entitled Special Note to Breast Implant and Other Personal Injury Claimants (the "Special Note") (attached hereto as Ex. D). The Special Note told claimants that

the Plan offered "[a] $25,000 payment" for rupture and disease payments "ranging from $12,000 to $300,000," both consisting of base payments plus additional premiums "to be paid later if funds allow." Special Note at 2. The Disclosure Statement similarly presented the Premium Payments as being part of the compensation offered to claimants rather than some remote and contingent possibility, warning only that the premium component was likely to be "delayed for several years." Disclosure Statement (Ex. B) at 10. *See also id.* at 97 (Premium Payments to begin "some years after the Effective Date," with the result that those receiving the earliest payments might have to wait "several years" for their premiums). Moreover, the basic Settlement Grid included in the Disclosure Statement (at 20) broke out in two columns, with no further qualification, the amount of "base" and "premium" settlement payments available for different categories of settlement benefits.

As noted below, the Dow Corning Plan differs in this respect from the Dalkon Shield settlement, which expressly provided for additional pro rata payments (in lieu of punitive damages) only *after* every single base claim had actually been *paid*. *See* below at 23-24. In contrast, claimants voting on the Dow Corning Plan were told to expect Premium Payments less than halfway through the 16-year life of the Settlement Facility – at a time when many millions of dollars in claims would remain to be processed and paid. It is not plausible that the parties intended, in that setting, to require a guarantee of future payment – and, of course, that is not what claimants were told. They were told only that future payment would have to be "*adequately* assured." Disclosure Statement at 4 n.3 (emphasis added).

Ultimately, the selection of a standard of certainty for making this determination requires a balancing of the remote risk that the cap might be exceeded against the real and serious harm to thousands of claimants who have waited years for their promised Premium Payments. Dow Corning posits the risk of insolvency as if it were a potential disaster, to be

avoided at all costs. *See* DCC Opp. 1-2. But even in a worst case scenario, it is likely that only a small number of claimants towards the end of the 16-year life of the Facility would have their claims reduced or delayed. While that might be an unacceptable risk for parties thrust involuntarily into an insurance company liquidation (*see* below at 26-27) or where a plan, as with Dalkon Shield, required all claims to be paid before premiums were considered (*see* below at 23-24), the Dow Corning Plan was publicized specifically with the "adequate assurance" language and the expectation of premiums being paid after seven years. Thus, all claimants who chose to settle undertook the (small) risk that the projection of adequacy would prove to be incorrect. For Dow Corning retroactively to change that bargain and insist that the last claimants in the door be exposed to *zero* risk serves neither fairness nor the greater good of the vast bulk of claimants, but is merely a ploy to delay Dow Corning's payment obligations. It should be rejected.

III. DOW CORNING'S ATTEMPT TO REQUIRE A NEW AND DIFFERENT METHODOLOGY FOR PROJECTING FUTURE CLAIMS SHOULD BE REJECTED AS INCONSISTENT WITH THE PLAN AND COMMONLY ACCEPTED PRACTICE

Dow Corning argues that ARPC's basic methodology "does not provide a reliable basis for assessing the sufficiency of available assets" because it supposedly consists only of "illustrative calculations that show the number and value of potential future claim filings" based on assumptions derived from historical claims data in the SF-DCT. DCC Opp. 15-16. Leaving aside the barrage of other, more specific criticisms addressed in Point IV, below, Dow Corning categorically objects to this methodology for two principal reasons: ARPC's supposed failure to assess the reliability or potential error rate of its methodology, and the sole reliance on historical claims data as a basis for projections rather than assessing epidemiological data on the prevalence of certain underlying symptoms and conditions in the general population.

The easy and complete answer to Dow Corning's criticism is that the methodology applied by ARPC is *required* by the Plan documents. SFA § 7.01(d) specifically

directs the Finance Committee and the Independent Assessor to generate quarterly "projections of the likely amount of funds required to pay in full" all pending and future claims and specifies that "[s]uch projections shall, to the extent known or knowable, be based upon and take into account" 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 Claims 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." 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 and distributions under the terms of the Settlement and Litigation Facilities, *including a detailed accounting of pending Claims and projections and analysis of the cost of resolution of such pending claims as described in Section 7.01(d)*" (emphasis added).

Thus, regardless of the scientific merit of projecting future Settlement Facility liability based on past claim filing and payment data, Dow Corning already specifically agreed – and the Bankruptcy Court ordered in confirming the Plan – that ARPC should employ precisely this method of claims projection. On this basis alone, Dow Corning's categorical objection to ARPC's methodology should be rejected.

In any event, as set forth in the Peterson Declaration, the methodology employed by ARPC is in fact the customary and accepted method of projecting the number and cost of liquidating future claims in a mass tort claims resolution facility. *See generally* Peterson Decl. Indeed, most significantly, Dr. Dunbar used essentially the same methodology to project the volume, amount, and timing of tort claims in the SF-DCT in connection with testifying at confirmation that Dow Corning's financial contribution would be adequate to resolve all claims

not just against Dow Corning but also against its shareholders. Dr. Dunbar based his projections largely on claims experience in the RSP, adjusting the results to assume a higher settlement acceptance rate based on the enhanced benefits offered under the Dow Corning settlement (including the promised Premium Payments). Significantly, this well-accepted method of projecting future claims based on past claims history requires neither of the features that Dow Corning posits as essential for a reliable projection methodology.

First, this methodology used by Dr. Dunbar and ARPC and specified by the Plan is not designed to and does not provide a formal "error rate," as Dow Corning demands. *See* DCC Opp. 16, 18. Like other forecasts, the projections performed by ARPC and Dr. Dunbar can be and have been tested by the basic scientific method of seeing whether or not subsequent data confirm or disconfirm the forecast. This is the gold standard for evaluating a forecast and is more direct and compelling than an "error rate" methodology. Dow Corning cites no authority for the proposition that claim projections must be accompanied by a formal analysis quantifying an error rate, other than the declaration of its own expert, Paul J. Hinton ("Hinton Decl."). While Mr. Hinton nominally decries the absence of a "quantified" rate of "statistical error" (*id.* ¶ 81), he does not explain how such an analysis would be conducted in the context of this methodology and cites no legal or academic authority requiring it. To the contrary, as explained in the Peterson Declaration, this methodology does not readily lend itself to a statistical error rate analysis. *See* Peterson Decl. ¶¶ 21-24.

However, the absence of a formal error rate analysis does not render this type of methodology unreliable. As Mr. Hinton himself acknowledges, "uncertainty can be analyzed by measuring the extent of variation in the available historical data and accessing the validity of forecast assumptions by comparison to other experience." Hinton Decl. ¶ 9. As explained in the Peterson Declaration, ARPC's analysis does precisely this: It is based on projections and

assumptions fine-tuned over several years of experience that have confirmed the reliability of ARPC's basic approach. While Dow Corning stresses that ARPC's May 2011 Report itself extrapolates from a specific 18-month calibration period (*see, e.g.*, DCC Opp. 16, 20), Dow Corning ignores that the constant-rate projections predicated on this methodology have proven, over the course of several years, to constitute a reliable upper bound projection of claims filing and processing in the SF-DCT. *See* Peterson Decl. ¶¶ 17-20. Indeed, with the benefit of that fine tuning, ARPC's projections have proven more accurate than Dr. Dunbar's, which employed a similar method at confirmation to generate projections approximately 25 percent *higher* than actual experience, but under which premiums were still projected to be paid after seven years. *See* CAC Response 8-9. Moreover, as Mr. Peterson explains, ARPC employed other methods to test the reliability of its projections, including applying varying assumptions about filing patterns to perform a classic "sensitivity analysis." Peterson Decl. ¶¶ 25-27.

Second, the claims-projection methodology commonly employed by ARPC, Dr. Dunbar, and others does not require an independent examination of epidemiological data about the population of potential claimants. Once again, while Mr. Hinton criticizes the absence of such an analysis (*see* Hinton Decl. ¶ 54), neither he nor Dow Corning cites to any authority suggesting that it is a necessary part of the type of claims projection analysis performed by ARPC pursuant to the Plan documents. Epidemiology may be useful in projecting the incidence of future claims in a broader population that may have been exposed to injury or disease with a long latency period, as in asbestos cases. But where, as here, experts are called upon to project the likely behavior of an already identified pool of claimants within a settlement facility, past claim filing history rather than epidemiology is considered the appropriate source of predictive data. *See* Peterson Decl. ¶¶ 57-62. In any event, as explained below (at 20-21), appropriate epidemiological data is simply not available here, and Dow Corning's attempt to supply such an

analysis with a pseudo-scientific discussion of the prevalence of specific symptoms in the general population is nothing more than junk science.

Finally, it is of no moment that ARPC did not itself offer an affirmative opinion that adequate funding was "assure[d]," as Dow Corning further complains. DCC Opp. 15. It is the function of the Finance Committee, not the Independent Assessor, to determine that the SFA's standard for the issuance of Second Priority Payments has been satisfied. Nor does ARPC's inclusion of customary cautionary language (which Dow Corning quotes with respect to the remote possibility of exceeding the cap with *100 percent* premiums) (DCC Opp. 15) affect the reliability of ARPC's projected cushion when applied to a more conservative 50 percent payment. There is no scenario offered in the 2010 IA Report in which the cap would be exceeded if premiums were limited, as the Recommendation does, to 50 percent.

In short, ARPC's basic methodology is not unreliable merely because it does not provide absolute certainty: "[E]stimation of future claims is inherently uncertain because patterns of past filings and characteristics of claims activity used to make forecast may change in the future." Hinton Decl. ¶ 9. But Dow Corning *bargained* to use precisely such a methodology here and told claimants that premiums would likely be paid *during* the life of the Settlement Facility, after a delay of only several years. Both Dow Corning and settling tort claimants who submit their claims towards the end of the 16-year period bargained to accept a degree of uncertainty – and, more importantly, to be bound by a reasonable projection using precisely the methodology underlying ARPC's work. Not only is the basic methodology sound, but as demonstrated further below it was applied here in a reliable way not subject to criticism on the grounds Dow Corning advances.

IV. ARPC'S PROJECTIONS PROVIDE A RELIABLE BASIS FOR CONCLUDING THAT PAYMENT OF ALL BASE CLAIMS IS ADEQUATELY ASSURED

Dow Corning also interposes a series of more specific criticisms that distort various aspects of ARPC's work and ignore the reality that claims in the SF-DCT have dropped off dramatically and are highly unlikely to reverse course suddenly and threaten the funding cap. Dow Corning argues that ARPC's projections are unreliable because they are "based entirely on the filing behavior of 838 claimants who submitted Disease claims during an 18-month period" (DCC Opp. 20) and require that all of ARPC's assumptions "are certain to occur" and that "there is no possibility" that claims filings will increase in any respect (*id.* at 18, 20).

Dow Corning's arguments are misleading on a number of levels. Most fundamentally, ARPC's analysis is obviously based not just on the "behavior" of those who filed claims during the calibration period, but on the pattern of claims filing within the entire universe of more than 118,000 original Class 5 claimants and the 67,000 remaining eligible claimants who have not yet filed disease or expedited release claims. *See* Peterson Decl. ¶¶ 30-33. Moreover, the confidence of the Finance Committee and the CAC in ARPC's projections is based not solely on one year's analysis, but on the reliability of ARPC's approach over a number of years. As described in detail in the CAC Response at 8-11, actual claims experience has consistently run below the upper bound of ARPC's projections, usually significantly below, and has also run well below the projections that Dr. Dunbar offered at confirmation. Mr. Hinton calculates slightly different projections based on variations in the calibration period (Hinton Decl. ¶ 49), but the effect on projections is trivial and, in any event, Dow Corning cannot dispute that the calibration methodology used by ARPC thus far has proven to be quite reliable in projecting future claims activity. Significantly, Mr. Hinton does not even mention any of ARPC's extensive work product prior to its May 2011 IA Report – totally ignoring that ARPC's projections have repeatedly been tested and confirmed as reasonable and accurate by subsequent actual events.

Dow Corning also ignores several highly conservative assumptions built into ARPC's work suggesting that the cushion is probably significantly *understated*. Most significantly, ARPC's projections used to calculate the cushion are based on the *constant* model, which assumes – implausibly – that there will be no additional drop-off in claims filing in the last few years of the SF-DCT. The much more likely assumption that claims will *decline* at least to some degree is supported by experience in the RSP, where claims tailed off sharply in the final years of the program, and the undeniable fact that claims in the SF-DCT itself have already significantly declined. This is demonstrated vividly by the chart included on page 22 of the May 2011 IA Report, which reflects a stark drop-off in claims since 2006 and also reflects that the recent mini-surge resulting from mass mailings consisted mainly of filings for expedited payments, which cannot threaten the Settlement Fund cap and indeed help reduce the risk of a future surge in disease claims. *See also* Peterson Decl. Figures 1-4.[5] Moreover, ARPC's projections give no value to the CAC's position in the TVC dispute (which the Court has now largely vindicated); assume that *all* of ARPC's projected "scenarios" will materialize at the full amount (which is unlikely); and further assume that every single claimant with an approved Proof of Manufacturer ("POM") will ultimately receive either a disease payment or an expedited release payment (which is impossible). *See* CAC Resp. 9, 17-18.

Thus, the reliability of ARPC's projections does not depend on every one of its assumptions occurring exactly as described, or on absolute certainty that no category of claims or particular claim period will experience *any* upward departure from projected volumes and amounts. The cushion creates a margin for error. And the conservative assumptions built into

[5] That disease claim filings exceeded the upper bound projection in a single month (May, 2011, by 22 claims) as part of the anticipated surge following several mass mailings (Recommendation, Ex. K at 2) hardly establishes a basis for questioning the overall downward trend of disease claims, the only category of claims potentially large enough to threaten the cap. As Mr. Peterson explains, overall claims experience in early 2011 resulted in *lower* overall dollar liability for the Trust than had been projected. Peterson Decl. ¶¶ 53-56.

ARPC's projections – together with the persistent pattern of minimal claim filings over the last five years – provide a reasonable basis to conclude that the net result of all future variations will not be such a dramatic increase in total required funding as to threaten the Settlement Fund cap.

Dow Corning's burden in undercutting the Finance Committee's reasonable judgment is not to identify factors that *could* increase the number or amount of claims in a particular period over ARPC's highest projections, but to show a likelihood of departure so severe – even when netted against likely downward departures from the upper bound projections – as to undercut the Finance Committee's judgment that funding for future base claims is adequately assured. Dow Corning's specific criticisms are either baseless or overstated. They provide no basis to question the Finance Committee's conclusion here.

First, Dow Corning speculates that different projections might result from an analysis of whether claimants with an approved POM and claimants who filed MDL claims with some proof of a Dow Corning implant "would be more likely to file claims in the future." DCC Opp. 20. However, Dow Corning does not explain or quantify the impact of this issue and indeed Mr. Hinton's chart establishes that ARPC's projections *do* assume that a greater proportion of claimants in these categories will file disease claims. *See* Hinton Decl. ¶ 42. What Dow Corning does *not* establish is why claimants in these categories are likely to *increase* their rate of filing as compared to the calibration period.

Second, Dow Corning faults ARPC for failing to assume that the filing rate will actually *increase* as the remaining pool of potentially eligible claimants ages. DCC Opp. 21; Hinton Decl. ¶¶ 43-45. It bases this specious assertion on the fact that older claimants *thus far* have generally filed at somewhat higher rates than younger ones. But Dow Corning identifies no social science suggesting that the same pool of claimants will file at a higher rate as it ages and ignores a far more important factor in predicting filing rates: whether claimants are represented

by firms with larger numbers of total clients. As explained in the May 2011 IE Report, "[l]aw firm size continues to be associated with filing patterns," with the larger categories of firms filing some type of claim on behalf of 89 to 96 percent of their clients with Proofs of Claims ("POCs"), while firms that represented between two and 50 claimants filed at the rate of 67 percent and pro se or single-client firms filed at a rate of only 38 percent. IA Report at 23. This effect results from the generally greater resources and sophistication of firms representing large numbers of claimants and is widely understood in the world of mass tort claims analysis. *See* Peterson Decl. ¶ 44.

Significantly, most of the larger law firm groups have already filed their claims, while most pro se or single-client law firm claims have yet to be filed. IA Report at 22. Fully 75 percent of the remaining active and eligible population now consists of such claimants – as compared to 60 percent in the original universe. *See* Peterson Decl. ¶ 50. Among pro se/single client claimants, older claimants have filed at moderately higher rates than younger claimants, but *all* categories of such claimants have filed at dramatically lower rates than those that were part of the larger firm groups, and the disparity is particularly sharp when the analysis is limited to disease claims. Indeed, a claimant represented by a firm with more than 500 clients is *more than fifty times more likely* to file a disease claim than is a pro se claimant. *See id.* at ¶ 51.

Thus, it is reasonable to assume that filing rates will actually *decline* among the older age brackets, because fewer of the remaining claimants are part of larger law firm groups. There is certainly no basis to assume that these predominantly pro se claimants will suddenly begin to file claims at meaningfully *higher* rates simply because they are older. Mr. Hinton's speculation that the filing rate of aging claimants is likely to *increase* by 41 percent over the life of the Trust (Hinton Decl. ¶ 44) is not just sheer speculation lacking any scientific basis – it also runs directly contrary to common sense and the best available evidence.

Third, Dow Corning argues that ARPC understated the size of the surge associated with the 2006 Rupture Claim deadline (which ARPC uses to predict expected deadline-driven surges in 2014 and 2019). *See* DCC Opp. 21. But using Rupture Claims, which can no longer be filed, as a model for future surges of other kinds of claims is at best a rough measure in any event. And even the modest claimed impact of projecting larger surges ($8.1 million) (*id*.), appears to be overstated because Mr. Hinton does not appear to have reduced the post-2014 projected monthly claim filings to account for claims that would already have been filed in connection with the increased 2014 surge. Nor is it clear whether he erroneously applied the increased projection to the 2019 surge, which ARPC already conservatively assumes will include disease or expedited payments to *all* outstanding claimants with POM. Thus, the expected net effect of Dow Corning's proposed change would be even more modest than Dow Corning suggests. *See* Peterson Decl. ¶ 54 n.5.

Fourth, Dow Corning misleadingly suggests that "very modest" changes in the monthly filing rate would have a "significant effect" on ARPC's calculations. DCC Opp. 21. But the "modest" change Dow Corning posits is in fact a *radical* increase that has no basis in the existing claims data or common sense. ARPC projects that, in non-deadline months, 0.066 percent of all outstanding claimants will file claims. Thus, the "very modest" increase that Dow Corning posits of .05 percentage points would represent a *75 percent* filing rate increase – from .066 to .116 of outstanding claimants each month. An increase of 0.1 percentage points would, in turn, represent a *150 percent* increase in the filing rate – i.e., an assumption that *two and a half times the number of claimants projected by ARPC* will actually file claims in a given month. *See* Hinton Decl. ¶ 48; Peterson Decl. ¶ 35. There is no basis in the record to assume that such a dramatic increase in filing rates is even remotely, much less reasonably, possible. And calling this a "very modest" change borders on misrepresentation.

Fifth, Dow Corning criticizes ARPC for projecting expected future filing rates for Option II claims based on the calibration period while calculating the rate of *approval* for claims based on claims filed over a longer period. DCC Opp. 22. But these assumptions make perfect sense. The *filing rate* going forward is likely to follow recent trends, or decline further. However, the *approval rate* for Option II claims over the remaining life of the SF-DCT is likely to mirror the overall application of criteria to all past claims whenever filed. Dow Corning's alternative suggestion – that the rate of approval of Option II claims be calculated based solely on claims that were *both* paid *and* filed during the last two years – would distort the resulting projections. Claims filed and paid within a limited time frame are likely to include a disproportionate number of high quality claims without obvious deficiencies that can be processed and paid promptly, without extended review or supplementation. Using the approval rates derived from claims processed over a longer period is likely to yield a more accurate forecast. *See* Peterson Decl. ¶ 36.

Sixth, as noted above, Dow Corning criticizes ARPC for failing to "consider the prevalence of compensable conditions in the aging population of claimants who remain eligible to file Disease claims." DCC Opp. 22. Dow Corning attempts to support this point with a pseudo-scientific presentation demonstrating the potential prevalence of individual *symptoms* – such as arthralgia, sleep disturbances, or breast pain – in the general population, from which Dow Corning (1) extrapolates a potential number of claimants in the remaining POC population that could have such symptoms, and then (2) speculates about the potential effect of different percentages of such claimants filing claims in the SF-DCT. *See* DCC Opp. 22-25; Hinton Decl. ¶¶ 54-65.

As explained in more detail in the Peterson Declaration, this is nonsense. Mr. Hinton identifies no relevant epidemiological data of any scientific value in projecting actual

future claims. He offers no scientific basis for assuming that a claimant with any particular symptom will in fact have one of the specific *combinations* of symptoms constituting a compensable disease; that any such claimants will proceed to obtain the necessary qualifying diagnosis of such a disease (including findings of the requisite level of disability and that symptoms did not pre-date implantation); or that any such claimants will then file a claim in the SF-DCT. Each of these leaps is based on speculation and guesswork. Mr. Hinton's attempt to identify a supposed "risk" of disease filings meaningfully higher than the consistent (and diminishing) pattern of filings to date (Hinton Decl. ¶ 62) is junk science pure and simple. It is entitled to zero weight.[6]

Seventh, Dow Corning attempts to minimize the projected cushion in various ways that do not establish any material risk to the Settlement Fund cap. Dow Corning describes the $68.3 million NPV cushion as constituting "only 3.5 percent of the Settlement Fund" (DCC Opp. 17), but it is more accurate to compare the cushion to the remaining future projected expenditures. APRC's highest projection for the amount needed in total claim payments is $403.0 million NPV, for the base case claims plus scenarios plus premiums paid in 2011. IA Report at 81. This total includes premium payments to historical claims ($137.4 million), which should be subtracted because they are not subject to projection uncertainty, and full future premiums ($40.1 million), only half of which should be counted because that is the current proposal for Second Priority payments. The result is $245.5 million NPV in future payments subject to projection uncertainty. Thus, the cushion is 28 percent ($68.3/$245.5) of the total amount of variable future exposure for the Trust – a far cry from 3.5 percent. *See* Peterson Decl. ¶ 34. Moreover, expressing the cushion in NPV dollars understates the nominal dollars available

[6] This would be true even if Dow Corning had not already agreed – as discussed above at 10-11 – that projections to determine the appropriateness of issuing Premium Payments are to be based on claim filing experience rather than epidemiology.

to pay claims – highly relevant, since individual claims are paid without any cost of living or other time value adjustment. In other words, one dollar of NPV Qualified Transfer paid to the Trust towards the end of its 16-year life actually represents approximately *two dollars* available to pay claims.

Finally, none of Dow Corning's attempts to whittle away at the cushion raise any material concerns. Dow Corning offers no reason to believe that increased severity payments will be more than a few million dollars NPV, or that other stray categories of unprocessed claims will result in any significant increased liability. *See* DCC Opp. 17 & n.16; Hinton Decl. ¶ 32.[7] Moreover, the CAC has no objection to the Court authorizing Second Priority Payments due to Dow Chemical on the same percentage basis as are approved for tort claimants, since that is consistent with the parties' agreement and will not threaten the Settlement Fund cap. *See* DCC Opp. 11-13. None of these factors creates any realistic risk that the SF-DCT will be unable to pay all First Priority claims as they come due.[8]

V. DOW CORNING FAILS TO DEMONSTRATE HOW EXPERIENCE FROM OTHER MASS TORTS RENDERS ARPC'S PROJECTIONS UNRELIABLE IN VIEW OF THE STANDARDS GOVERNING THE PREMIUM APPROVAL PROCESS IS THIS CASE

Dow Corning further argues that experience from other mass torts counsels a "conservative and careful approach before Second Priority Payments may be made." DCC Opp. 27. The CAC does not disagree with this statement, and in fact the Finance Committee has been

[7] Dow Corning's assumption that paying 50% of increased severity payments, which are a category of Second Priority Payments, will reduce the cushion by more than $10 million is based on the speculative assumption that the entire $15 million cap for Option I claims will be exhausted and a mischaracterization of an ARPC sensitivity analysis regarding Option II payments as an actual projection. *Compare* DCC Opp. 17 n.16 *with* IA Report at 13.

[8] Finally, the Court need not consider at this time whether the remaining balance of the Litigation Fund could be accessed to make First Priority Payments at a later date once the Court had authorized Premium Payments. *See* DCC Opp. 13-14. The potential need to access the Litigation Fund is based on extremely remote and unlikely circumstances and can be addressed if and when that additional cushion is needed. We note only that Dow Corning cites nothing in the Plan barring the Finance Committee from seeking access to such funds in the circumstances described.

exceedingly careful and conservative in waiting until now to recommend Premium Payments and in seeking approval for only a 50 percent payment at this time. Dow Corning fails to explain, however, how any of the other torts that it describes – each of which has its own history and trajectory of claims experience – require rejection of the Finance Committee's Recommendation.

Dow Corning's principal argument in this regard is based on a purported parallel between the SF-DCT and the Dalkon Shield Claimants' Trust (the "Dalkon Trust"), which was established in the late 1980s to resolve claims against the A.H. Robins Company arising out of injuries caused by the Dalkon Shield intrauterine contraceptive device. Dow Corning submits a declaration from Professor Georgene M. Vairo, chair of the Dalkon Trust, describing the process followed in that case to authorize residual payments to certain claimants. Professor Vairo and Dow Corning attempt to draw a parallel to the SF-DCT, arguing that the information available now to the Finance Committee does not establish adequate funding with a level of certainty that would have been acceptable to the Dalkon Trust in making its own distributions. DCC Opp. 28-29; *see* Declaration of Georgene M. Vairo ("Vairo Decl.") ¶¶ 29-32.

However, as the Vairo Declaration itself establishes, the Dalkon Trust was applying a totally different standard in different circumstances. Contrasts between the structure of the two settlements only underscore the reasonableness of the Finance Committee's Recommendation here. The agreement governing distributions under the Dalkon Trust provided that claimants with timely, meritorious compensatory damage claims "shall have first call on the funds of the Trust" and specified the prerequisites for authorizing payments of lower priority claims:

> To the extent funds remain after all such claims are paid in full, meritorious compensatory damage claims which are time-barred shall then be administered and paid from the funds of the Trust. To the extent funds . . . remain after all such claims are paid in full, the remaining funds shall be paid in lieu of punitive damages

> to all claimants . . . who receive compensatory damage awards from the Trust, on a pro rata basis consistent with such awards.

Vairo Decl. ¶ 19. In other words, the Dalkon Trust did not merely require adequate assurance that future claims *would* be paid, it required that all First Priority claims *actually be paid* before any lower priority claims could be considered for payment. *See* Vairo Decl. Attach. 28 at 33 ("The Plan provided that if funds remained *after the last timely and late claims were paid*, the remaining Trust corpus would be paid to claimants on a pro rata basis.") (emphasis added).

In light of that standard, it is not surprising that the Dalkon Trust was exceptionally conservative in authorizing pro rata payments. As Professor Vairo describes, the trustees authorized pro rata payments only after all timely claims had been evaluated, all but 5,000 such claims had been resolved, and processing of late claims was substantially advanced (although not complete). *See* Vairo Decl. ¶ 24-26. Arguably, authorizing pro rata payments before all higher priority claims had actually been paid violated the terms of the Trust, which expressly stated that pro rata payments could be made only "after all [higher priority] claims are paid in full." *Id.* at ¶ 19. In skirting this requirement to expedite payments to claimants, the Dalkon Trust obviously felt constrained to apply a standard of near-certainty. The trustees may have also been influenced by their initial fear that there would not be enough money even to pay all timely claims, a concern that Professor Vairo described as "terrifying" in her Dalkon Shield testimony. *See* Vairo Decl. Attach. 27, Part 1 at 24-25.

Here, in contrast, there is no requirement that all First Priority claims be paid before premiums may be authorized, and there has never been a serious concern about the adequacy of the Settlement Fund. As discussed above, Dow Corning expressly agreed that premiums could be authorized while base claims were still being processed and paid, based on *projections* providing adequate assurance that enough money would ultimately be available. This is a completely different standard than the one governing the Dalkon Trust. Thus, Professor

Vairo's opinion that the Dalkon Trust would have declined to authorize pro rata distributions based on the analysis contained in the 2010 IA Report is an utterly irrelevant non sequitur. Professor Vairo has not purported to independently evaluate ARPC's work, or even to review any portion of it prior to the latest IA Report. *See* Vairo Decl. ¶ 6. Her declaration proves nothing of any relevance here and should be given no weight.

Dow Corning's other mass tort examples are equally far afield:

- Dow Corning notes that publicity in the year before the final deadline for filing Agent Orange claims led to a substantial upsurge in claims. DCC Opp. 25. But as explained by Mr. Hinton, the Agent Orange surge followed a massive national publicity campaign involving 10,000 daily and weekly newspapers and 6,000 radio stations. Hinton Decl. ¶ 76. Obviously, 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 over a period of years.

- Dow Corning points out that the Phen Fen/Diet Drug settlement drew a much higher number of claims than was initially anticipated – a miscalculation that became clear within two years after the settlement was approved. DCC Opp. 25-26 & n.10. While the Original Global Settlement in the breast implant litigation led to a similar surprise in 1995, that is now ancient history. Dow Corning fails to explain how the Phen Fen experience would lead one to expect a sudden, last-minute surge of breast implant claims after more than 15 years of claims resolution experience.

- Dow Corning also describes in detail adjustments that had to be made to payment procedures during the operation of various asbestos trusts. DCC Opp. 26-27. Again,

Dow Corning does not explain the relevance of these specific examples other than to support the truism that a cautious approach is appropriate. DCC Opp. 27.[9]

Finally, Dow Corning offers the declaration of William Barbagallo ("Barbagallo Decl.") for the proposition that the SF-DCT should be governed by the standards applied by an insurance company liquidator in prioritizing payment of claims, arguing that "[a]dministrators of insolvent insurers are in precisely the same situation as this Court." DCC Opp. 27. But Mr. Barbagallo's declaration makes clear that this is far from the case. He explains that in corporate insolvencies classes of creditors must be created and, as a general matter, "decisions to distribute funds beyond first priority claimants are not made until all First Priority claims have been identified, liquidated and their value agreed or established with certainty." Barbagallo Decl. ¶ 11. Applying that standard – analogous to the absolute priority rule under the Bankruptcy Code – Mr. Barbagallo opines that it would be "highly imprudent to make discretionary distributions less than half-way through the life of a receivership or a settlement fund," adding that the 2010 IA Report "would not have provided the requisite degree of certainty to permit distributions in the limited fund proceedings in which I have been involved." *Id.* ¶ 15.

Mr. Barbagallo's opinion is irrelevant for exactly the same reason as Professor Vairo's: the standard applied generically in bankruptcy and insurance liquidations is simply different from the one contractually agreed to by Dow Corning and enacted in the Plan. The default rule in bankruptcy is that all senior claims must be paid before junior claims receive *anything*. But Dow Corning and the tort claimants agreed to a different standard here – and, indeed, Dow Corning expressly contemplated, and communicated to claimants, that it expected

[9] Mr. Hinton's declaration contains another example that Dow Corning did not even have the nerve to include in its brief – the September 11th Victim Compensation Fund. Mr. Hinton notes that almost half of the total claims under that fund were filed on December 22, 2003, the eligibility deadline. Hinton Decl. ¶ 78. Mr. Hinton does 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 September 11 attacks.

the SF-DCT to do precisely what Mr. Barbagallo says would be "highly imprudent" – pay premiums midway through the life of the Trust while many base claims still remain to be filed, processed, and paid. Late-filing claimants in the SF-DCT thus are *not* similarly situated to involuntary first priority creditors in a liquidation whose right to priority payment may be entitled to absolute protection. They, like Dow Corning, voluntarily agreed to participate in a settlement under which Premium Payments could be authorized *before* all First Priority Payments were made. As a result, the Court is *not* in the same position as an insurance trustee. It is called upon to implement the procedures agreed to and enacted in the Plan, which differ from those embodied in the Dalkon Trust, the Bankruptcy Code, and insurance liquidation practice. Mr. Barbagallo's opinion about the adequacy of ARPC's work to support paying lower priority claims in an insurance liquidation is totally irrelevant and should be given no weight.

* * *

In short, Dow Corning points to no reasonable basis to expect a material deviation from the consistently reliable projections generated by ARPC's conservative approach. The CAC believes that adequate assurance would exist for the payment of First Priority claims even if 100 percent premiums were authorized. The Finance Committee's more conservative approach of recommending authorization only for 50 percent premiums creates only an infinitesimal risk of insolvency and should be promptly approved.

Conclusion

For the reasons stated above and in the other filings of the CAC and the Finance Committee, the CAC respectfully requests that the Court approve the Recommendation and grant such other and further relief as is just and appropriate.

Dated: New York, New York
December 23, 2011

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2011 a true and correct copy of the following response was served via First Class mail or electronic mail as indicated upon the parties listed below:

REPLY OF CLAIMANTS' ADVISORY COMMITTEE IN FURTHER SUPPORT OF FINANCE COMMITTEE'S FIRST AMENDED RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE PARTIAL PREMIUM PAYMENTS

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