

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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

**MOTION OF CLAIMANTS' ADVISORY COMMITTEE  
FOR ORDER RESOLVING DISPUTE REGARDING  
TREATMENT OF INITIAL PAYMENT**

The Claimants' Advisory Committee (the "CAC") respectfully submits this Motion seeking an Order resolving the dispute over the treatment of the Initial Payment, which was addressed but not fully disposed of in connection with the decision and appeal of *Dow Corning Corporation's Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents* (Docket No. 714) (the "Time Value Credit Motion").<sup>1</sup>

The dispute centers on whether Dow Corning is entitled to a Net Present Value ("NPV") adjustment to the calculation of its funding stream based on the timing of its Initial Payment to the Trust. Dow Corning's claim for an NPV adjustment for the Initial Payment creates a \$200 million contingency in the annual Plan funding projections. This contingency may materially affect the timing of Premium Payments due under the Plan to qualifying breast implant claimants because premiums may be paid only when there is adequate confirmed

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<sup>1</sup> Capitalized terms not defined herein have the meanings assigned in the Time Value Credit Motion.

funding to make all future base payments, and the contingency reduces the amount of that confirmed funding. The Court of Appeals affirmed this Court's decision on the Time Value Credit Motion rejecting Dow Corning's claim for an NPV adjustment for its Initial Payment, but only insofar as that claim was based on the Time Value Credit provisions of the Plan. The Court of Appeals' decision left open a possibility, neither advanced nor argued by either party, that some other Plan provision might provide the basis for making an NPV adjustment.

Dow Corning's Time Value Credit Motion was intended to obtain a definitive ruling as to whether Dow Corning could, on *any* basis, receive an NPV adjustment in connection with the Initial Payment. While the initial motion was framed in terms of the Time Value Credit mechanism, its purpose was to resolve the contingency affecting the availability of funding for the Premium Payments in its entirety so that claimants would begin to receive the payments they had been promised. The CAC therefore brings this motion to obtain the broader ruling originally intended by the Court that Dow Corning is not entitled to an NPV adjustment for the Initial Payment under *any* Plan provision.

The grounds for this Motion are set forth in detail in the accompanying Memorandum in Support.

Counsel for the CAC and Dow Corning have met and conferred with respect to this Motion. Counsel for the CAC has requested, but did not obtain, concurrence in the relief sought.

A proposed Order is attached hereto.

Dated: New York, New York  
August 5, 2013

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION OF CLAIMANTS’  
ADVISORY COMMITTEE FOR ORDER RESOLVING DISPUTE  
REGARDING TREATMENT OF INITIAL PAYMENT**

The Claimants’ Advisory Committee (the “CAC”) respectfully submits this Motion seeking an order resolving the dispute over the treatment of the Initial Payment addressed but not fully disposed of in connection with the decision and appeal of *Dow Corning Corporation’s Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents* (Docket No. 714) (the “Time Value Credit Motion”).<sup>1</sup>

**PRELIMINARY STATEMENT**

Dow Corning brought the Time Value Credit Motion in 2010, at the Court’s request, to obtain a definitive ruling resolving a contingency potentially affecting the timing of Premium Payments: whether Dow Corning was entitled to a Net Present Value (“NPV”) adjustment to the calculation of its funding stream based on the timing of the Initial Payment.

As the Court knows, the answer may materially affect the timing of Premium Payments due under the Plan to breast implant claimants who have already qualified for and

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<sup>1</sup> Capitalized terms not defined herein have the meanings assigned in the Time Value Credit Motion.

received base payments. Premiums may be paid only when annual projections required under the Plan confirm adequate funding to cover them along with all future base payments. Dow Corning's claim for an NPV adjustment for the Initial Payment created a \$200 million contingency that reduces the available "cushion" under the settlement cap and therefore may delay Premium Payments – a contingency the parties and the Court intended to definitively resolve one way or the other through Dow Corning's original motion.

Dow Corning framed its request as one for a Time Value Credit adjustment, but its motion was predicated on the more general claim that it must receive a present value adjustment for any payment made ahead of schedule in order to preserve the NPV of its total settlement payments. The subsequent briefing and hearing on the Time Value Credit Motion covered the full range of issues going not just to technical construction of the TVC provisions, but also to whether Dow Corning was entitled to an NPV adjustment *at all* based on the timing of the Initial Payment: *i.e.*, (1) whether the pre-Effective Date transfer of the Initial Payment from one restricted escrow to another was truly a "payment" under the Plan and (2) whether the parties could have intended for Dow Corning to obtain the claimed credit when they had bargained to assign the time value of the Initial Payment irrevocably to the Trust as of April 30, 1999, regardless of when the money was transferred.

In rejecting Dow Corning's claim for a TVC for the Initial Payment (Docket No. 836 (11/28/11 Order)), this Court at least implicitly rejected *all* claims for an NPV adjustment for the Initial Payment. This is evident from the broader scope of issues presented to the Court, its acknowledgement of certain of the CAC's general arguments against an adjustment, and the fact that the very *purpose* of Dow Corning's motion was to resolve a contingency affecting the availability of funding for Premium Payments. A ruling denying a TVC but leaving open the

possibility of an NPV adjustment for the Initial Payment on some other basis that Dow Corning had never suggested might be available would have been useless to the Court and the parties.

The Court of Appeals affirmed this Court's denial of Dow Corning's claim for a TVC in connection with the Initial Payment, and that denial is now law of the case. However, the Sixth Circuit read this Court's decision as reaching *only* the TVC issue and not the broader question of whether Dow Corning might obtain an NPV adjustment for the Initial Payment under some other Plan provision – and it therefore declined to address or express any opinion as to the latter question, effectively narrowing the scope of the affirmed order to construction of the specific TVC provisions.

The CAC therefore brings this motion to obtain the broader ruling that it believes the Court initially intended to issue – and that the parties needed – in connection with the Time Value Credit Motion. The CAC believes that a further ruling denying Dow Corning an NPV adjustment in connection with the Initial Payment under any theory can be granted based on the existing record, which already contains the factual predicate for Dow Corning's claim and the parties' full arguments with respect to whether such a credit was or could have been intended under the Plan documents. The CAC thus respectfully incorporates by reference herein the full record on Dow Corning's initial Time Value Credit Motion (including, without limitation, the specific docketed items cited herein).

As explained further below, the idea that Dow Corning could, as the Sixth Circuit speculated, receive an NPV adjustment for the Initial Payment under the Plan's "true-up" provision or when it has actually spent \$2.35 billion NPV (both of which would happen, if at all, only at or near the end of the sixteen-year life of the Trust) makes no sense under the structure of the Plan. Indeed, the argument is foreclosed, *a fortiori*, by the Court's affirmed holding that no

such adjustment is available through the TVC mechanism. Both this Court and the Court of Appeals correctly recognized, as the CAC argued, that the “true-up” provision may eventually be used to fine-tune the present value calculation based on the timing of certain smaller payments that do not expressly receive NPV credits. But the parties could not have intended to deny Dow Corning a contemporaneous TVC for the Initial Payment only to permit a massive claim that could blow up the economics of the Trust to surface *after sixteen years*. Permitting such a contingency would be fundamentally inconsistent with the need for reliable projections to permit payment of premiums *during* the life of the Trust. The parties thus understood that such an NPV adjustment would be available, if at all, only as a TVC to the ongoing payment ceilings – and Dow Corning expressly represented to this Court that the TVC mechanism was “the *only* way to preserve the NPV cap as of the Effective Date.” Docket No. 736 (Reply in Support of Dow Corning Corporation’s Time Value Credit Motion (“Dow Corning Reply”)) at 2. Even if Dow Corning attempts now to walk away from this express waiver and argue that it might obtain an NPV adjustment for the Initial Payment under some other Plan provision, this Court should reject any such argument and hold – as the CAC believes it always intended to – that Dow Corning is not entitled to an NPV adjustment for the Initial Payment under *any* Plan provision.

### **STATEMENT OF FACTS**

The central dispute presented in the Time Value Credit Motion was whether Dow Corning’s transfer of the Initial Payment from its own escrow accounts into a restricted escrow within the Trust ahead of the Effective Date was intended to be an event of economic significance – *i.e.*, whether the parties intended that Dow Corning would receive an NPV adjustment with respect to its overall funding obligation based on the timing of this transfer.

Dow Corning brought the Motion, at the Court’s request, to obtain a definitive answer to this question. The funding and claim payment structure of Dow Corning’s Plan makes

clear why it was crucial to determine not just whether Dow Corning was entitled to TVC adjustments in its Annual Payment Ceilings, but whether the timing of the Initial Payment entitled Dow Corning to *any* adjustment to the funding stream under *any* provision. The Court recognized that Dow Corning was seeking *finality* on this issue: “According to Dow Corning, because the Finance Committee and Dow Corning require certainty regarding the payment obligations, Dow Corning filed the instant motion . . . .” Docket No. 836 (11/28/11 Order) at 6.

As the Court knows, to induce creditor votes for the settlement embodied in its Plan, Dow Corning promised that breast implant claimants who qualified for and received rupture and disease payments would receive additional Premium Payments, constituting 20-25% of their base payments, if funds were available within the settlement cap. These premiums were intended, in part, to compensate for the delays of bankruptcy, and claimants have now been waiting *since 1999* to receive these payments. Premium Payments were expected to be issued several years into the sixteen-year life of the Settlement Facility, which began paying claims in 2004 and is now past the half-way point. The Plan provides for the Independent Assessor (“IA”) to conduct annual projections of the Trust’s outstanding liabilities and analyze whether the remaining funding stream will be sufficient to pay all future base claims as well as premiums. Based on the IA’s work, the Trust’s Finance Committee is charged with recommending to the Court when to authorize Premium Payments. *See* SFA § 7.03.

The IA’s projections conservatively assume that any contingencies that may affect the future funding stream will, in fact, materialize. Thus, until the issue is settled, the IA will likely continue to assume, as it has to date, that Dow Corning *will* receive an NPV adjustment in connection with the Initial Payment – reducing the overall projected available funding by approximately \$200 million NPV. While the question of whether this adjustment was available



specifically through a TVC to the Payment Ceilings might have affected annual cash flow, the overarching question in projecting the adequacy of the fund is whether such an adjustment will *ever* be available, because making the adjustment at the *end* of the sixteen years would have the same NPV impact on the overall funding stream as implementing it through TVCs.<sup>2</sup>

Through 2010, claimants had qualified for premiums totaling approximately \$222 million in nominal dollars.<sup>3</sup> Noting the effect of the Initial Payment issue on the available cushion, the Finance Committee moved in 2011 for authorization to pay 50% of the outstanding premiums, which would cost approximately \$69 million NPV and leave a cushion of approximately \$82 million NPV above projected payments to pay unanticipated base claims.<sup>4</sup> Significantly, the premium motion, like the IA's reports, assumes that Dow Corning *will* receive an NPV adjustment for the Initial Payment, but it reflects the Finance Committee's judgment that, *even without* the additional \$200 million, a sufficient cushion exists to pay 50% premiums. Dow Corning opposed the motion, disputing (among other things) whether an adequate cushion existed to permit any premiums to be paid.<sup>5</sup> Since a January 31, 2012 hearing, the Court has had the premiums motion under advisement.

The parties have long understood that resolving the \$200 million Initial Payment

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<sup>2</sup> For further explanation of the structure of the Plan provisions governing Premium Payments, *see* Docket No. 825 (Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments) at 4-8.

<sup>3</sup> *See id.* at 4.

<sup>4</sup> *See* Docket No. 814 (Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments) at 10-12.

<sup>5</sup> *See generally* Docket No. 826 (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).

contingency – and potentially confirming the existence of a much larger cushion – could materially affect the timing of Premium Payments, particularly the payment of *full* premiums. Dow Corning’s Time Value Credit Motion was thus intended to obtain a definitive ruling as to whether it could, on *any* basis, receive an NPV adjustment in connection with the Initial Payment. Dow Corning’s motion framed this request in terms of TVCs because the parties understood that, if Dow Corning were entitled to such an adjustment at all, it would be under that mechanism.<sup>6</sup>

In response to Dow Corning’s motion, the CAC noted the absence of any Plan language providing for a TVC in connection with the Initial Payment and also advanced two principal arguments why *any* NPV adjustment for the Initial Payment would be inconsistent with the structure of the Plan and the intent of the parties: (1) pre-Effective Date transfer of the Initial Payment from one restricted escrow into another could not be considered a “payment” under the Plan, because the funds could not be used to pay claims, but only to cover certain limited administrative expenses on further court order; and (2) providing Dow Corning with a present value adjustment would undo a central bargain in the Plan, through which Dow Corning agreed to assign the earning power of the Initial Payment for the benefit of the Trust starting on April 30, 1999, *regardless of when the funds were actually transferred*.<sup>7</sup>

Dow Corning replied on each issue, still focusing on the TVC mechanism, but more broadly arguing the necessity of preserving the NPV of its funding stream – and reflecting its understanding that the parties could not have intended to defer the issue until the end of the

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<sup>6</sup> See Docket No. 714 (Time Value Credit Motion).

<sup>7</sup> See Docket No. 730 (Response to Dow Corning Corporation’s Motion to Enforce Application of Time Value Credits (“CAC Response”)) at 11-16.

Trust: “The inescapable fact is that applying TVCs to the Initial Payment is the *only* way to preserve the NPV cap as of the Effective Date.”<sup>8</sup>

This Court denied Dow Corning’s claimed NPV adjustment for the Initial Payment, noting the absence of any express provision for a TVC in the Funding Agreement, but also acknowledging the CAC’s arguments that providing Dow Corning with an adjustment “for having transferred the Initial Payment into escrow *pre*-Effective Date is inconsistent with the Plan and the parties’ intentions and conduct.” 11/28/11 Order at 9. The Court further noted the express assignment to the Trust of the actual interest earned on (*i.e.*, the time value of) the Initial Payment starting from April 30, 1999. *Id.* at 10.

On appeal, the Sixth Circuit affirmed, but read this Court’s decision with respect to the Initial Payment as rejecting only a credit under the specific TVC provisions, leaving open the question of whether Dow Corning might obtain an NPV adjustment for the Initial Payment under *other* Plan provisions – specifically, FPA § 2.05(a)(ii) (the so-called “true-up” provision in which the NPV of the overall funding stream is fine-tuned at the end of the 16 year settlement program) or FPA § 2.01(c) (under which Dow Corning may seek a declaration that it has fully satisfied its funding obligations). *See Dow Corning Corp. v. Claimants’ Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632 (6th Cir. Mar. 8, 2013), slip op. at 21.

The CAC moved for rehearing and rehearing *en banc*, arguing that the Court of Appeals had erroneously left open the very issue intended to be resolved by this Court: whether Dow Corning could *ever* claim a \$200 million NPV credit in connection with the Initial Payment. Although the Court of Appeals corrected its decision to acknowledge that this broader

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<sup>8</sup> Docket No. 736 (Dow Corning Reply) at 2.

question had been *raised* below, the court adhered to its ultimate holding that the broader issue was not *decided* below, and therefore denied rehearing. *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632 (6th Cir. Apr. 18, 2013), slip op. at 21.

Following issuance of the mandate, the parties conferred, and Dow Corning indicated that – notwithstanding its earlier statement that the TVC provision was the “*only way*” under the Plan for it to obtain an NPV adjustment for the Initial Payment – it will seek to exploit the opening created by the Court of Appeals and argue for such an adjustment under one or more other Plan provisions. The parties thus have an actual dispute with immediate consequences to the administration of the Plan: Dow Corning’s continuing claim for a \$200 million credit based on the timing of the Initial Payment perpetuates a contingency that to date has prevented the IA and the Finance Committee from concluding that a sufficient cushion exists to seek approval for *full* Premium Payments. Resolving that contingency by confirming that Dow Corning is *not* entitled to its claimed credit would eliminate any good faith dispute about the Settlement Fund’s adequacy to cover full premiums and all future base payments. While the pending 50% premium motion may be granted without resolving the Initial Payment issue – and, indeed, the Sixth Circuit’s ruling confirms the wisdom of the Finance Committee’s conservative approach – resolving the issue would obviously strengthen *any* motion for premiums by confirming the existence of a larger cushion. The CAC therefore now moves for an order resolving this dispute and eliminating this contingency once and for all.

**ARGUMENT**

**THE ARGUMENTS SUPPORTING DENIAL OF THE TIME  
VALUE CREDIT MOTION ALSO DEFEAT DOW CORNING'S  
BELATED ATTEMPT TO CLAIM A NET PRESENT VALUE ADJUSTMENT  
FOR THE INITIAL PAYMENT UNDER ANY OTHER PLAN PROVISION**

The CAC seeks a ruling under the Court's authority to interpret the Plan and Plan documents<sup>9</sup> completely disposing of the issue first presented in the Time Value Credit Motion: whether Dow Corning is entitled to a net present value adjustment based on the timing of the Initial Payment. As affirmed by the Court of Appeals, the Court's denial of that motion means that Dow Corning cannot claim such an adjustment under the only Plan provisions it has ever invoked for this purpose: FPA §§ 2.03 and 2.04, which provide for Time Value Credits in certain circumstances. The Court should now rule that the claimed credit is not available under any *other* Plan provision.

The dispute regarding Dow Corning's continuing claim for a \$200 million adjustment is a real and ongoing controversy. Accordingly, the declaratory relief sought by the CAC is appropriately granted under the Declaratory Judgment Act. Such relief is available where, as here, "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) *see also* 28 U.S.C. § 2201(a) (2006) (Declaratory Judgment Act empowers a federal court, "[i]n a case of actual controversy within

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<sup>9</sup> Under Plan § 8.7.3, the Court retains jurisdiction "to resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents." The June 10, 2004 Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan (Docket No. 53) provides, in § 3.01 of Exhibit A, that disputes regarding interpretation of Plan Documents other than the Claims Resolution Procedures may be submitted to the Court by motion.

its jurisdiction, . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought”).

Denial of the Time Value Credit Motion leads inexorably to denial of Dow Corning’s claim for a present value adjustment for the Initial Payment under any other Plan provision, for two reasons. First, the CAC’s basic arguments against the claimed adjustment were not tied specifically to the TVC concept but apply equally to an adjustment sought under any Plan provision. Second, it simply makes no sense, under the basic structure of the Plan, that the parties would have intended to *deny* a TVC for the Initial Payment but *permit* the same adjustment years later under another provision. Dow Corning implicitly admitted as much when it averred in support of its prior motion: “The inescapable fact is that applying TVCs to the Initial Payment is the *only* way to preserve the NPV cap as of the Effective Date.”<sup>10</sup> Although Dow Corning may not technically be estopped from disavowing this position, since it did not prevail on its prior motion, its admission affords a telling view of the parties’ intentions.

The CAC’s arguments against Dow Corning’s claimed \$200 million adjustment are set forth in its response to the Time Value Credit Motion (Docket No. 730) and are incorporated by reference here. In brief, because it was understood that confirmation appeals could delay the Effective Date of the Plan for several years, the parties agreed that pending such an appeal Dow Corning would be required to transfer the Initial Payment from its own escrow accounts into accounts held by the Trust. This transfer was largely symbolic, since claims could not be paid until the Effective Date, and only a tiny fraction of the escrowed funds could be spent, with further court approval, to establish the Claims Facility.

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<sup>10</sup> Docket No. 736 (Dow Corning Reply) at 2.

The parties also agreed that the actual interest earned on \$905 million of the Initial Payment – *i.e.*, its *time value* – would be assigned, outside the funding cap, for the benefit of the Trust as of April 30, 1999, *regardless* of whether the money was still being held by Dow Corning or had been transferred to the Trust’s escrow. Dow Corning’s agreement to assign the time value of the \$905 million was an important, bargained-for term that was part of the mosaic of compromises constituting the Dow Corning Plan. It locked in the time value of a significant chunk of the settlement fund, augmenting the fund with interest earned outside of the \$2.35 billion funding cap. This was an important offset for other plan provisions benefiting Dow Corning, including having the date to determine the NPV present value of the settlement roll forward to the eventual Effective Date, rather than being fixed at the time of the parties’ agreement (which had the effect of sharply reducing the present value of the settlement measured from 1998), and the denial of any cost of living increases to individual claimants.<sup>11</sup>

On these facts, the CAC argued in its original response that the parties could not have intended for the timing of Dow Corning’s transfer of the Initial Payment into the Trust escrow to trigger the right to an NPV adjustment; rather, the parties intended always to treat the Initial Payment as if it had been transferred on the Effective Date. This conclusion was based on two distinct arguments, both of which apply equally to Dow Corning’s original TVC motion and to any subsequent arguments Dow Corning may make for an NPV adjustment under some other Plan provision:

*First*, because of the severe restrictions on the use of the transferred funds, the transfer should not be viewed as a “payment” under the FPA. Until then, transfer of ownership

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<sup>11</sup> See Docket No. 730 (CAC Response) at 5-8.

of the funds was only conditional, and the Trust did not have the unfettered right to use the funds for their intended purpose.

*Second*, permitting Dow Corning to claim an NPV adjustment based on the timing of the Initial Payment would be inconsistent with – and, essentially, undo – the parties’ express agreement to assign the time value of most of the Initial Payment for the benefit of the Trust as of a fixed date.<sup>12</sup>

As noted above, the CAC believes that, in denying Dow Corning’s original motion, this Court intended to credit these arguments and rule generally that Dow Corning was not entitled to an NPV adjustment under any Plan provision. However, the Court of Appeals read this Court’s decision as more narrowly applying only to construction of the specific TVC provisions. The Court of Appeals speculated that, while the TVC provisions did not give Dow Corning an NPV adjustment, it might still claim such a credit under two Plan provisions on which the parties had not focused in their briefing. The first, FPA § 2.05(a)(ii), also known as the “true-up” provision, directs the Claims Administrator, within 90 days of the end of Funding Period 16 to determine the NPV of all payments made to the Trust, and, to the extent fundable expenditures remain to be paid within the \$2.35 billion cap, directs Dow Corning to make a final payment to the Trust. The second provision, FPA § 2.01(c), states that Dow Corning’s funding obligation will cease, *inter alia*, when it has paid the full \$2.35 billion NPV required by the FPA, and permits Dow Corning to seek confirmation from the Court when this has occurred. Based on projections and actual experience in the Settlement Facility, it is clear that Dow Corning will

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<sup>12</sup> *Id.* at 11-16.



have occasion to invoke this provision only at or near the end of the sixteen-year settlement program.

On remand, Dow Corning will presumably argue that it may claim an NPV adjustment for the Initial Payment under one or both of these provisions. Since Dow Corning previously disclaimed the ability to obtain such a credit under anything but the TVC provisions, it is not clear what reasoning it will use in its attempt to exploit the opening created by the Court of Appeals. However, this Court's prior ruling denying a TVC for the Initial Payment logically also requires that Dow Corning's new claim be rejected. The CAC's principal arguments – that the highly restricted transfer of the Initial Payment into escrow cannot be considered a “payment” under the Plan and that Dow Corning should not be permitted to undo its bargain in assigning the time value of the Initial Payment to the Trust – logically apply regardless of which plan provision Dow Corning seeks to invoke as a basis for its claimed credit. The gist of the CAC's argument is that, reading all the plan provisions together, the parties did not intend for the physical transfer of funds from one escrow to another to be an event of economic significance.

Indeed, even if the CAC's original arguments were not controlling, the very structure of the plan renders it highly illogical to think that the parties intended to *deny* Dow Corning a TVC for the Initial Payment during the life of the settlement program but nevertheless *grant* the same credit under one of these two provisions at the end of the program. That is because the Plan requires annual projections of the available remaining funding so that Premium Payments may be issued as soon as it becomes clear that sufficient funding will be available to pay them as well as all future base claims. Dow Corning anticipated – and claimants were told – that the Premium Payments would likely be approved a few years into the settlement program. The parties thus must have intended that large items that may materially affect the NPV funding

stream be recognized and credited as soon as the facts giving rise to them become clear. Dow Corning began claiming its TVC shortly after the Effective Date (*see* Time Value Credit Motion, Exh. 7), and the parties later agreed that the issue should be presented to this Court for decision when it became clear that the contingency was affecting the Finance Committee's ability to recommend approval of Premium Payments. The issue was presented to the Court for the express purpose of addressing and eliminating this contingency so that all parties would know what level of funding would be available going forward.

Thus, the plan structure strongly suggests that, if the parties intended for Dow Corning to receive an NPV adjustment based on the anticipated early transfer of the Initial Payment, they would have provided for the credit to be recognized through the TVC provisions, so that Dow Corning's payment ceilings would be adjusted going forward and the parties would have a clear idea of the funding available to pay premiums. The parties could not have intended to deny such a credit and yet permit the same massive contingency to loom over the Trust until virtually the end of the settlement program. Since the IA would likely have to take account of the contingency for projection purposes, holding open the possibility of this massive credit until the end of the settlement program could significantly delay full Premium Payments – making it impossible to pay them, as anticipated, a few years into the program and prejudicing claimants who have already been waiting *fourteen years* for their promised payments.

In short, the Court's denial of a TVC for the Initial Payment logically precludes Dow Corning's claim for such a credit under any other Plan provision. Certainly the two provisions identified by the Sixth Circuit could not have been intended to be a mechanism for such a massive credit. However, for the avoidance of doubt, the CAC respectfully requests that the Court enter an order stating unequivocally that Dow Corning cannot claim the disputed credit

under *any* Plan provision. If Dow Corning intends ever to argue that such a credit may be available under any other such provision, it should set forth that argument in response to this motion. As noted, while a ruling on this contingency is not necessary before the Court rules on the currently pending motion to authorize partial Premium Payments, definitively eliminating this contingency will make possible the prompt payment of *full* premiums.

**CONCLUSION**

For the foregoing reasons, the CAC respectfully requests that the Court enter an order, substantially in the form attached, holding that Dow Corning may not claim a net present value adjustment to its funding obligation based on the timing of the Initial Payment under any Plan provision.

Dated: New York, New York  
August 5, 2013

Respectfully submitted,

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*Counsel for the Claimants' Advisory  
Committee*

**CERTIFICATE OF SERVICE**

I certify that on August 5, 2013, I electronically filed a copy of the foregoing Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment, supporting memorandum, and a proposed order with the Clerk of the Court through the Court's electronic filing system, which will send notice and copies of the aforementioned documents to all registered counsel in this case.

/s/ Jeffrey S. Trachtman

Jeffrey S. Trachtman

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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**

**PROPOSED ORDER OF GRANTING MOTION OF CLAIMANTS'  
ADVISORY COMMITTEE FOR ORDER RESOLVING DISPUTE  
REGARDING TREATMENT OF INITIAL PAYMENT**

The Court, having considered the Claimants' Advisory Committee's ("CAC") Motion for Order Resolving Dispute Regarding Treatment of Initial Payment and Dow Corning's opposition thereto, the Court finds and concludes as follows:

1. The Motion for Order Resolving Dispute Regarding Treatment of Initial Payment is meritorious and should be granted.
2. Dow Corning is not entitled to nor may it claim a net present value adjustment to its funding obligation based on the timing of the Initial Payment under any Plan provision.
3. As a result, the Claims Administrator need make no adjustment to the Annual Payment Ceilings based on Dow Corning's payment of the Initial Payment.

ACCORDINGLY, it is hereby ORDERED, this \_\_\_ day of \_\_\_\_\_ 2013 that, the Motion is GRANTED in all respects.

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**DENISE PAGE HOOD**  
United States District Judge