

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

IN RE:

DOW CORNING CORPORATION,

REORGANIZED DEBTOR

§
§
§
§
§
§
§
§

**CASE NO. 00-CV-00005-DPH
(Settlement Facility Matters)**

Hon. Denise Page Hood

**OPPOSITION OF DOW CORNING CORPORATION TO THE MOTION
OF CLAIMANTS' ADVISORY COMMITTEE FOR ORDER RESOLVING
DISPUTE REGARDING TREATMENT OF INITIAL PAYMENT**

Deborah E. Greenspan
DICKSTEIN SHAPIRO LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
GreenspanD@dicksteinshapiro.com

Debtor's Representative and Attorney for
Dow Corning Corporation

September 9, 2013

Dow Corning Corporation (“Dow Corning”) respectfully submits this Response to the Motion of Claimants’ Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment and memorandum in support thereof (“CAC Motion”).¹

PRELIMINARY STATEMENT

The discrete issue raised by the CAC Motion is whether Dow Corning is entitled to a net present value adjustment to reflect its accelerated payment of the Initial Payment prior to the Plan’s Effective Date.² Such an adjustment is mandated by the Plan: the limitation on Dow Corning’s funding obligation is stated in net present value terms and the Plan provides unequivocally that Dow Corning shall not pay more than \$2.35 billion net present value. The FPA is clear: “In no event shall Dow Corning be required to fund (whether with Insurance Proceeds or cash) an amount in excess of a net present value of \$2,350,000,000 discounted at the rate of 7% per annum to the Effective Date.” FPA § 2.01.³ This means that the value of each funding payment made must be computed in present

¹ Unless otherwise defined, capitalized terms herein have the meanings provided in the Plan, the Funding Payment Agreement (“FPA”) and in Dow Corning Corporation’s Motion To Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization And Related Documents and memorandum in support of thereof, Docket No. 714 (“Time Value Credit Motion”).

² While the CAC Motion only addresses the Initial Payment, the analysis herein applies similarly to all payments made before the Effective Date.

³ Dow Corning respectfully incorporates by reference its prior briefing on, attached exhibits to, and the entire record related to its Time Value Credit Motion.

value terms. That is, each nominal dollar payment must be adjusted by the 7% annual rate with reference to the Effective Date in order to determine the net present value of the funding payments in the aggregate.

The language and structure of the FPA make clear that this net present value adjustment must be applied regardless of when the payment was made. There is nothing in the Plan or FPA that exempts any funding payment from this adjustment simply because the payment was made before the Effective Date. The Plan excludes only two payments from the computation of the funding cap: the actual interest Dow Corning paid on the Initial Payment and interest on any defaulted payments, should they occur. Under fundamental rules of contract interpretation, these limited explicit exclusions mandate the conclusion that a net present value adjustment must be applied to every other payment.

In its Motion, the Claimants' Advisory Committee ("CAC") improperly and confoundingly mischaracterizes the decisions of this Court and the Sixth Circuit. This Court did not – as the CAC contends – explicitly or implicitly “reject” or “den[y]” a net present value adjustment for the Initial Payment. CAC Mem. at 2, 8. The Sixth Circuit *expressly* found that “the issue of a net present value adjustment for the Initial Payment *was not resolved*” by this Court and, for that reason, determined that the issue should be resolved by this Court in the first instance. *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement*

Facility Dow Corning Trust), No. 11-2632 (6th Cir. Apr. 18, 2013) (“4/18/13 Order”) at 21 (emphasis added). The Sixth Circuit specifically declined to address the issue “for the first time on appeal.” *Id.* The Sixth Circuit’s determination is unequivocal and it was reaffirmed after considering the CAC’s petition for rehearing.

After noting that there is no dispute regarding the cap on Dow Corning’s funding obligations, the Sixth Circuit explained that the issue on appeal was the “method used to ensure that Dow’s payments do not exceed” the undisputed \$2.35 billion net present value funding cap “calculated as of the Effective Date and using a discount rate of 7% per year.” *Id.* at 9. The Sixth Circuit rejected Dow Corning’s contention that the funding cap must be protected by applying a Time Value Credit to adjust each Annual Payment Ceiling every time a funding payment is made. The Sixth Circuit distinguished the concept of a credit to a future Annual Payment Ceiling (i.e., a Time Value Credit) and a net present value adjustment. The Sixth Circuit concluded that the net present value adjustment concept is applied to adjust Dow Corning’s payments “to the Effective Date to compare their net present value with the net present value funding cap.” *Id.* at 13. In contrast, the Time Value Credits “perform a different function altogether.” *Id.* The Sixth Circuit explained that “[c]rediting the time value of an excess payment against a future Annual Payment Ceiling is a separate calculation from *adjusting* Dow’s total

payment to the Effective Date to compare their net present value with the net present value funding cap.” *Id.* at 14 (emphasis in original).

The Sixth Circuit found that it was not necessary to adjust the Annual Payment Ceilings to enforce the funding cap because the FPA contains provisions that specifically “perform this function.” *Id.* First, as the Sixth Circuit explained, the FPA generally requires the Claims Administrator to “calculate the net present value as of the Effective Date of all payments Dow has made.” *Id.* Recognizing that this “true-up” might be performed “too late,” the Sixth Circuit further explained that the FPA expressly provides a mechanism for Dow Corning to seek a determination that its funding obligations are terminated. *Id.* at 15. Thus, “[s]o long as Dow keeps track of the net present value of its payments and promptly petitions the district court to declare its funding obligations terminated, it will never be required to pay more than it agreed to pay.” *Id.*

The Sixth Circuit recognized and reaffirmed the sanctity of the net present value funding cap and further determined that the funding cap is to be preserved by computing the net present value of the funding payments and terminating funding so that the cap is not breached. *Id.* The Sixth Circuit expressly found that the parties disputed whether this net present value computation applies to the Initial Payment, noting that the FPA exempts from the calculation only interest received on a portion of the Initial Payment. *Id.* at 20-21. The Sixth Circuit, as noted,

declined to address this issue because the district court had addressed only the issue of Time Value Credits and not the issue of net present value adjustments. *Id.* at 21.

The CAC misleadingly contends that this Court's earlier decision on the Time Value Credit Motion and the Sixth Circuit's affirmance of that decision foreclose any argument that Dow Corning may enforce the net present value cap through either a true-up process or termination of funding. This argument turns the Sixth Circuit's analysis on its head. The Sixth Circuit's decision cannot be read to suggest (as the CAC contends) that its rejection of the use of Time Value Credits to adjust Annual Payment Ceilings means that there can be no net present value adjustment to the Initial Payment. To the contrary, the Sixth Circuit found that the availability of these two methods provided the basis for the Sixth Circuit's conclusion that it was not necessary to adjust future Annual Payment Ceilings to protect the funding cap.

Moreover, the CAC's position simply does not make sense. To adopt the CAC's position would require this Court to pretend – for purposes of calculating the net present value of the funding cap – that the Initial Payment was made on some fictional, arbitrary date, rather than the actual (pre-Effective Date) date on which it was actually paid. Such an approach has no textual underpinning in the

Plan Documents or in reality. The parties could not have reasonably intended to engage in such a fiction.

The CAC also makes unsupported, incorrect and inflammatory allegations about Dow Corning's motives and the practical effect of enforcing the Plan as written and intended by the parties. Dow Corning did not "induce" claimants to settle by "promis[ing]" Premium Payments and does not seek to "exploit" the Sixth Circuit's decision. CAC Mem. at 5, 9, 14, 15. And applying a net present value adjustment to the Initial Payment would not "blow up the economics of the Trust." *Id.* at 4. The Plan expressly provides that all payments are subject to net present value adjustments unless otherwise specified in order to preserve the \$2.35 billion net present value funding cap – a fact acknowledged by this Court, the Sixth Circuit and the CAC itself.

In order to effectuate the clear language of the Plan Documents, the structure of the Plan and the intention of the parties, and in accordance with well-established principles of contract construction and basic mathematical principles, every payment that is made must be valued by applying the net present value adjustment, unless expressly excluded in the Plan Documents.

STATEMENT OF ISSUES

The issue before this Court is whether Dow Corning is entitled to a net present value adjustment to reflect its accelerated payment of the Initial Payment

prior to the Plan's Effective Date when the Plan and the FPA require the application of such an adjustment to any funding payment regardless of when the payment was made, unless expressly excluded in the Plan Documents.

STATEMENT OF FACTS

The current issue before this Court – whether Dow Corning is entitled to a net present value adjustment to reflect its accelerated payment of the Initial Payment – arose out of Dow Corning's request that Annual Payment Ceilings that govern its potential future funding obligations be adjusted to account for the time value of various payments made in advance of the funding schedule outlined in the FPA. Dow Corning had argued that the only way to ensure that it does not pay more than the Plan's absolute \$2.35 billion net present value funding cap was to adjust each Annual Payment Ceiling to apply a credit for early payment – so that the sum of the payments already made and the future payments does not exceed the funding cap. *See, e.g., Dow Corning's Time Value Credit Motion.* Dow Corning maintained that the FPA referred to these adjustments as “net present value” or “Time Value Credit” adjustments, and that those terms were “synonymous.” *See, e.g., Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632, Brief of Appellant Dow Corning Corporation (6th Cir. May 10, 2012) (“6th Cir. Opening Brief”) at 9, 28.

Both this Court and the Sixth Circuit disagreed, finding that net present value adjustments and Time Value Credits are distinct concepts. Both courts found that the Time Value Credit adjustment applies to adjust future Annual Payment Ceilings only where expressly noted in the FPA. Neither court, however, suggested that this limited application of Time Value Credits to adjust Annual Payment Ceilings would or could override the mandate to protect the net present value funding cap. This Court properly recognized that “[t]he parties are clear in their intent that the Net Present Value not exceed \$2.35 billion and expressly so note in various places in the Plan documents.” Docket No. 836 (Order Regarding Motion To Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization And Related Documents) (“11/28/11 Order”) at 11. This Court further agreed that “Dow Corning is entitled to Net Present Value adjustments.” *Id.* at 16.

The Sixth Circuit also expressly recognized that the Plan and FPA are structured to ensure that Dow Corning’s payments do not exceed the \$2.35 billion net present value funding cap. 4/18/13 Order at 13-15. Specifically, in affirming this Court’s ruling, the Sixth Circuit concluded:

When considering the meaning of “Time Value Credit,” it is also crucial to distinguish between a *credit* to a future Annual Payment Ceiling and a net present value *adjustment*. Dow asserts that the concepts are the same, but they clearly are not. The Funding Agreement refers to *adjusting* Dow’s payments to the Effective Date to

compare their net present value with the net present value funding cap. Funding Agreement § 2.01. “Net present value adjustment” is a convenient way to refer to this adjustment calculation, but it is not a defined term. As mentioned above, with a possible exception identified below, all payments must be adjusted to the Effective Date to ensure that the net present value of all the payments does not exceed a total net present value of \$2.35 billion. Time Value Credits, on the other hand, perform a different function altogether. A Time Value Credit is only applicable when a payment is required by the Funding Agreement to be credited against a future Annual Payment Ceiling. The key word is “credit.”

Id. at 13 (emphasis in original). As noted, the Sixth Circuit *explicitly* remarked that the issue of whether Dow Corning is entitled to a net present value adjustment for the early payment of the Initial Payment “was not resolved in the first instance by the district court” and therefore declined to address it for the first time on appeal. *Id.* at 21-22. Thus, neither this Court nor the Sixth Circuit decided how the net present value adjustment would be applied to the pre-Effective Date payment of the Initial Payment.

The CAC then moved for rehearing and rehearing *en banc* to address this outstanding issue. *Dow Corning Corp. v. Claimants’ Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632, Appellee’s Petition for Rehearing and Rehearing *En Banc* (6th Cir. Mar. 22, 2013) (“CAC’s Rehearing Petition”). Dow Corning opposed the CAC’s petition on the grounds that such relief was neither appropriate nor necessary because the CAC did not satisfy the

applicable rules for rehearing and because the Sixth Circuit correctly decided that the issue can and should be addressed by this Court in the first instance. *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632, Response of Dow Corning Corporation to Appellee's Petition for Rehearing and Rehearing *En Banc* (6th Cir. Apr. 8, 2013) ("Dow Corning Resp. to Reh'g Pet."). The Sixth Circuit denied the CAC's Rehearing Petition, concluding that the issues had been "fully considered" in its decision. *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632, (6th Cir. May 30, 2013) ("5/30/13 Order").

ARGUMENT

I. DOW CORNING IS ENTITLED TO A NET PRESENT VALUE ADJUSTMENT FOR THE INITIAL PAYMENT.

The CAC does not dispute the absolute \$2.35 billion net present value funding cap on Dow Corning's funding obligation. Nor does the CAC dispute that the operative date for determining net present value is the Effective Date. Nor does the CAC dispute that the parties specifically carved out from the general net present value adjustment directive the actual interest Dow Corning paid on the Initial Payment. Nor does the CAC dispute that the FPA specifically provides mechanisms to ensure that Dow Corning does not exceed the net present value funding cap. Nonetheless, the CAC argues that the parties "understood that such an NPV adjustment would be available, if at all, only as a TVC to the ongoing

payment ceilings.” CAC Mem. at 4. But the CAC’s recollection of some supposed “understanding” of the parties some 14 years ago is not only inaccurate and wholly unsupported. It is also squarely contrary to the decisions of this Court and the Sixth Circuit, the language of the Plan, fundamental rules of contract interpretation, and the function of the true-up and termination provisions in the FPA.

A. Both This Court And The Sixth Circuit Properly Recognized That The Plan Requires A Net Present Value Adjustment For “All Payments” Unless Otherwise Specified.

The CAC mischaracterizes this Court’s decision by stating that this Court “implicitly rejected *all* claims for a NPV adjustment for the Initial Payment” and “denied Dow Corning’s claimed NPV adjustment for the Initial Payment.” *Id.* at 2, 8 (emphasis in original). Although the CAC “believes that...this Court intended to...rule generally that Dow Corning was not entitled to an NPV adjustment under any Plan provision” (*Id.* at 13), it does not and cannot point to any specific language in this Court’s opinion denying Dow Corning a net present value adjustment for the Initial Payment. Indeed, the Sixth Circuit explicitly found that the issue of whether Dow Corning is entitled to a net present value adjustment for the early payment of the Initial Payment was outstanding and “express[ed] no opinion” on the issue. 4/18/13 Order at 21-22. The Sixth Circuit reiterated this position by denying the CAC’s Rehearing Petition seeking to resolve the issue,

concluding that the issues had been “fully considered” in its decision. 5/30/13 Order. Thus, the CAC’s assertion that any argument that a net present value adjustment should apply to the Initial Payment “is foreclosed, *a fortiori*” by the Sixth Circuit’s decision on the Time Value Credit issue (CAC Mem. at 3-4) is belied by clear language of the Sixth Circuit’s ruling. In fact, the CAC itself recognizes that “[t]he Court of Appeals’ decision “left open a possibility...that some other Plan provision might provide the basis for making a NPV adjustment” for the Initial Payment. CAC Mot. at 2.

Similarly, the CAC baldly asserts that Dow Corning “admitted” that “[d]enial of the Time Value Credit Motion leads inexorably to denial of Dow Corning’s claim for a net present value adjustment...” and that Dow Corning somehow “waive[d]” or “disclaimed” any entitlement to a net present value adjustment for the Initial Payment by stating in its Time Value Credit Motion that “applying TVCs to the Initial Payment is the *only* way to preserve the NPV cap as of the Effective Date.” CAC Mem. at 4, 11, 14 (emphasis in original). The CAC itself admits that such an argument cannot be supported. Dow Corning’s position was that the concept of a “Time Value Credit” was coextensive with the net present value adjustment requirement and that those terms were in fact “synonymous.” 6th Cir. Opening Brief at 9, 28. Thus, there is no inconsistency between Dow Corning’s current position and its prior one; Dow Corning’s

statement simply reflected its view (rejected by the courts) that net present value adjustments were required in order to protect the funding cap – through Time Value Credits or some other mechanism.

As the CAC concedes, Dow Corning “may not technically” – i.e., under applicable legal standards – “be estopped from disavowing this position.” *Id.* at 11. The doctrine of judicial estoppel requires a showing both that (1) the adverse party took an inconsistent position in a prior proceeding and (2) that position was adopted by the tribunal, either as a preliminary matter or as part of a final disposition. *See Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897-98 (6th Cir. 2004); *Vaughn v. Washtenaw*, 2011 WL 2271315 at *4 (E.D. Mich. June 8, 2011). As the CAC itself recognizes, it cannot prove the essential elements of judicial estoppel. Both this Court and the Sixth Circuit *rejected* Dow Corning’s assertion in its Time Value Credit briefing that “the concepts [of a credit to a future Annual Payment Ceiling and a net present value adjustment] are the same.” *See* 4/18/13 Order at 13.

It is the language of the Plan Documents – not the CAC’s conjectures about the unstated intentions of this Court or the CAC’s misguided logic or inapplicable legal standards – that dictates the resolution of this issue. And the Plan language and structure dictate the application of a net present value adjustment for the Initial Payment.

B. The Parties' Express Exclusion Of The Interest Dow Corning Paid On The Initial Payment From A Net Present Value Adjustment Demonstrates The Parties' Intent To Apply A Net Present Value Adjustment To The Initial Payment.

The CAC does not and cannot point to any language in the Plan Documents that reflects the parties' purported "understanding" that a net present value adjustment would only be available through the Time Value Credit mechanism. In fact, as both this Court and the Sixth Circuit have found, the FPA recognizes and mandates that funding payments be valued after application of a net present value adjustment. This same concept applies to the Initial Payment (and any other pre-Effective Date payment).

The plain structure of the Plan and the FPA compels this conclusion. The FPA's express exclusion of interest on the Initial Payment from the net present value adjustment underscores the parties' intent *to include* a net present value adjustment for all other payments including the Initial Payment itself.

Dow Corning paid actual interest on \$905 million of the Initial Payment (without deduction for taxes and expenses) "from...the [April 30, 1999] Interest Accrual Date until the date the Initial Payment was made to the Settlement Facility." FPA § 2.01(a). The FPA specifically excludes from the net present value funding calculation the actual interest received on \$905 million of the Initial Payment. Section 2.01(a) provides that the interest Dow Corning paid on the Initial Payment "shall not be included in calculating the payment of the net present

value of \$2,350,000,000 under this Agreement.” *Id.* The quoted language also appears identically in one other place in the FPA. Under Section 5.01(a), if Dow Corning ever fails to make a payment when due, it is required to pay interest on the unpaid amount and that interest is not counted towards the funding cap.

Under the principle of “*expressio unius est exclusio alterius*,” when certain categories are specified in detail in a contract, other terms of the same character relating to the same matter are excluded by implication. *See Gurney’s Inn Resort & Spa Ltd. v. Benjamin*, 878 F.Supp.2d 411, 424-25 (E.D.N.Y. 2012); *Realtime Data, LLC v. Melone*, 961 N.Y.S.2d 275, 278 (N.Y. App. Div. 2013). Thus, “where only one exception is mentioned in a contract...exceptions not mentioned cannot be engrafted upon it.” Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)*, 69 Miss. L.J. 73, 155 (1999) (quoting *Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 415 (Miss. 1966)). The Court must thus infer from the two express exclusions from the calculation of the \$2.35 billion net present value funding cap that the parties intended to include everything else, including the Initial Payment, in the net present value calculation. If the parties had intended to exclude any net present value adjustment for the Initial Payment, they could have and should have included such language in the FPA.

Both this Court and the Sixth Circuit correctly recognized that the parties “clearly” intended to exclude from the \$2.35 billion net present value funding cap the actual interest on the Initial Payment. This finding was based on the “clear” and “express[.]” language of the FPA, the DTA and other Plan Documents. 4/18/13 Order at 21 (the actual interest on the Initial Payment is “clearly...disregarded when calculating the net present value”); 11/28/11 Order at 10-11 (“The DTA expressly noted that any interest earned by Dow Corning on the Initial Payment would be transferred to the Depository Trust” and therefore would not be counted in any net present value calculation). The absence of similar language with respect to the Initial Payment itself conclusively demonstrates that the parties intended to calculate a net present value adjustment for the Initial Payment.

C. The True-Up And Termination Provisions In The FPA Are Merely Mechanisms That Effectuate The \$2.35 Billion Net Present Value Funding Cap.

The CAC argues that the true-up and termination provisions in the FPA are the only potential bases (other than Time Value Credits applied to Annual Payment Ceilings to the extent they are specifically provided for in the FPA) to enforce the \$2.35 billion net present value cap – and that these provisions do not contemplate a net present value adjustment for the Initial Payment. This argument reflects a misunderstanding of the nature and function of those provisions. Net present value adjustments are rooted in and required under the structure, intent and express

language of the Plan, along with fundamental mathematical principles. *See* Docket No. 714-3 (Time Value Credit Motion Exhibit 1, Declaration of Paul J. Hinton) at 4-6, ¶¶ 11, 14, 16.⁴ The true-up and termination provisions are merely the *mechanisms* that implement the \$2.35 billion net present value funding cap. As the Sixth Circuit properly recognized, these provisions are intended to effectuate the long-term overall structure and intent of the FPA by “protect[ing] Dow from paying more than it agreed to pay.” 4/18/13 Order at 15.

As the Sixth Circuit explained, the true-up and termination provisions operate in “the long run” to adjust payments at the end of the final Funding Period or at the point at which Dow Corning believes its funding obligations are terminated. *Id.* at 14-15. These provisions thus address the specific “method used to ensure that Dow’s payments do not exceed this funding cap.” *Id.* at 9. These provisions do not alter the fundamental principle that preserves Dow Corning’s limited funding obligation, i.e., that all payments must be adjusted to the Effective Date to enforce the net present value funding cap. The Sixth Circuit properly

⁴ In support of its Time Value Credit Motion, Dow Corning’s expert explained these basic mathematical concepts and the practical effect of failing to make adjustments to account for the timing of payments. He stated that “[t]he time value of money is a fundamental principle in economics and finance and describes how much less a sum of money is worth if it can only be spent in the future rather than immediately.” *Id.* at 5-6, ¶ 14. He also explained that “nominal aggregate funding obligation[s] increase with deferrals and decrease with early payments.” *Id.* at 5, ¶ 11. Dow Corning’s expert then illustrated how the \$2.35 billion net present value funding cap could be compromised by a calculation that fails to apply adjustments that reflect the timing of payments. *Id.* at 5, ¶ 14.

recognized this distinction, citing the true-up provision as a mechanism that “requires the Claims Administrator, after the final Funding Period, to calculate the net present value as of the Effective Date of all payments Dow has made.” *Id.* at 14.

D. Dow Corning Filed Its Time Value Credit Motion In Order To Clarify The Proper Methodology For Adjusting The Annual Payment Ceilings; Premium Payments Were Not Contemplated By, Much Less The Motivation For, The Motion.

The CAC mischaracterizes the nature of Premium Payments under the Plan. The Plan does not “promise[.]” that Premium Payments will be paid at any specific time, or even that they will be paid at all. CAC Mem. at 5, 15. Rather, Premium Payments are supplemental “Second Priority Payments” that *may* be paid to eligible claimants *only if and when* all First Priority Payments – including those due to claimants who file claims up until the filing deadline in 2019 – are “assure[d].” *See* Settlement Facility and Fund Distribution Agreement § 7.01(c)(iv). The distribution of Premium Payments is governed by the process and language of the Plan, which, as noted, requires that Premium Payments must be deferred unless the payment of “base payments” are assured. The outcome of the CAC Motion will not resolve the issue of the unacceptable uncertainty in the analysis of the liquidated value and timing of future claims seeking payment from the SF-DCT that is relevant to the Premium Payment issue.

The CAC also mischaracterizes Dow Corning's intent in filing the Time Value Credit Motion. The purpose of the Time Value Credit Motion was not, as the CAC repeatedly asserts without citation, to "resolv[e] a contingency potentially affecting the timing of Premium Payments." CAC Mem. at 1, 2, 7, 15. Rather, the purpose of the Time Value Credit Motion was to determine the proper methodology for calculating the amounts Dow Corning could be required to pay under the Annual Payment Ceilings. As set forth in its prior briefs and as the CAC acknowledges (CAC Mem. at 15), Dow Corning raised the issue of applying Time Value Credits to adjust the Annual Payment Ceilings in order to reflect accelerated payments made under the funding schedule in 2004, years before the issue of Premium Payments was even under consideration. Dow Corning Resp. to Reh'g Pet. at 7-10. Thus, Premium Payments were not even a tangential purpose, much less the "express purpose," of Dow Corning's Time Value Credit Motion. CAC Mem. at 15.

E. The CAC's Renewed Arguments – That Allowing A Net Present Value Adjustment For The Initial Payment Would Undo A Purported "Bargain" And That The Pre-Effective Date Payment Of The Initial Payment Was Not A "Payment" – Have No Merit.

The CAC continues to rely on incorrect, unsupported, extra-contractual arguments it proffered in opposing the Time Value Credit Motion for the notion that Dow Corning is not entitled to a net present value adjustment for the Initial Payment. Specifically, the CAC argues (1) that applying a net present value

adjustment to the Initial Payment would violate an alleged “bargain” that the Plan Proponents reached and (2) that the pre-Effective Date transfer of the Initial Payment into escrow for the benefit of creditors does not constitute a “payment” under New York law and bankruptcy law and therefore cannot accrue net present value adjustments. *Id.* at 7, 12, 14. These arguments have no contractual, factual or legal basis and therefore must fail.

As set forth in Dow Corning’s prior briefing, no Plan Document reflects any “bargain” in which Dow Corning purportedly relinquished its right to a net present value adjustment for early funding of the Initial Payment. *See* Docket No. 736 (Reply in Support of Dow Corning Corporation’s Time Value Credit Motion) (“Time Value Credit Reply”) at 1-3; *Dow Corning Corp. v. Claimants’ Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, No. 11-2632, Reply Brief of Appellant Dow Corning Corporation (6th Cir. June 29, 2012) (“6th Cir. Reply”) at 11-17. Had the parties “bargained” for the dramatic departure from the net present value Effective Date funding cap advocated by the CAC, they would have clearly expressed that intent in the Plan Documents. Appropriate language to reflect such an intent could easily have been coupled with the provision in Section 2.01(a) of the FPA that excluded Exempted Interest from the net present value calculation – for example, by adding that, for purposes of calculating net present value, the

Initial Payment shall be deemed to have been made on the Effective Date. The absence of such language is fatal to the CAC's position.

Indeed, the fact that interest on the payment of the Initial Payment is expressly excluded from the calculation of the net present value of the funding cap not only does not support the CAC's position; it undermines it. As set forth above, had the parties intended to treat the *payment* of the Initial Payment the same as the actual *interest* accrued on the Initial Payment by excluding it from the net present value calculation, they would have and should have clearly expressed that intent in the Plan Documents. The absence of such an exemption reinforces the parties' intention to count the net present value of the Initial Payment toward the funding cap.

Moreover, the CAC's "payment" argument ignores the incontrovertible facts set forth in the Plan and Depository Trust Agreement: that the Escrow Account was a part of the Trust, that the Trustee was vested with control over the Initial Payment immediately upon payment, that there was no "pre-condition" to the use of these assets and that the Trustee had the authority to spend funds irrevocably (i.e., Dow Corning could not recoup any authorized expenditures paid from the Escrow Account). *See* Time Value Credit Reply at 3-4; 6th Cir. Reply at 6-8. This argument also ignores applicable law and the actual settlement distribution history, including the pre-Effective Date distribution of \$18.4 million Class 6D Settlement

paid to Australian claimants. *See* Time Value Credit Reply at 3-4; 6th Cir. Reply at 8-11.

CONCLUSION

For the foregoing reasons, Dow Corning respectfully requests that this Court deny the CAC Motion seeking declaratory relief that Dow Corning is not entitled to a net present value adjustment to the calculation of its \$2.35 billion funding cap for its early payment of the Initial Payment.

Dated: September 9, 2013

Respectfully submitted,

DICKSTEIN SHAPIRO LLP

By: /s/ Deborah E. Greenspan

Deborah E. Greenspan
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

DEBTOR'S REPRESENTATIVE
AND ATTORNEY FOR DOW CORNING
CORPORATION

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

IN RE:

DOW CORNING CORPORATION,

REORGANIZED DEBTOR

§
§
§
§
§
§
§

**CASE NO. 00-CV-00005-DPH
(Settlement Facility Matters)**

Hon. Denise Page Hood

**PROPOSED ORDER OF DOW CORNING CORPORATION
DENYING THE MOTION OF CLAIMANTS' ADVISORY COMMITTEE
FOR ORDER RESOLVING DISPUTE REGARDING
TREATMENT OF INITIAL PAYMENT**

The Court has considered the Opposition of Dow Corning Corporation to the Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment (Docket No. 917, the "CAC Motion") and the Court finds and concludes that the CAC Motion should be denied.

ACCORDINGLY, it is hereby ORDERED that the CAC Motion is DENIED.

Dated: _____

DENISE PAGE HOOD
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

DOW CORNING CORPORATION,

REORGANIZED DEBTOR

§
§
§
§
§
§
§
§

Case No. CV-00005 -DPH
(Settlement Facility Matters)

Hon. Denise Page Hood

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2013, a true and correct copy of the following motion was served via electronic mail or first class mail upon the parties listed below:

OPPOSITION OF DOW CORNING CORPORATION TO THE MOTION OF
CLAIMANTS' ADVISORY COMMITTEE FOR ORDER RESOLVING
DISPUTE REGARDING TREATMENT OF INITIAL PAYMENT.

DICKSTEIN SHAPIRO LLP

By: /s/ Deborah E. Greenspan

Deborah E. Greenspan
1825 Eye Street, N.W.
Washington, DC 20006
Tel.: 202-420-2200; Fax: 202-420-2201
GreenspanD@dicksteinshapiro.com

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

LOCAL COUNSEL:

Lamont E. Buffington, Esq.
Garan Lucow Miller, P.C.
Woodbridge Place/1000 Woodbridge Street
Detroit, MI 48207-3192
lbuffington@garanlucow.com

September 9, 2013 service parties:

FINANCE COMMITTEE

The Hon. Frank Andrews
145 Lonesome Road
P.O. Box 410
Hunt, TX 78024
fandrews145@gmail.com

Ann M. Phillips
Claims Administrator
Settlement Facility-Dow Corning Trust
3100 Main Street, Suite 700
Houston, TX 77002
APhillips@sfdct.com

Professor Francis E. McGovern
Duke University School of Law
P.O. Box 90360
Durham, NC 27708-0360
mcgovern@faculty.law.duke.edu

CLAIMANTS' ADVISORY COMMITTEE

Dianna L. Pendleton-Dominguez
Law Office of Dianna Pendleton
401 N. Main Street
St. Marys, OH 45885
Dpend440@aol.com

Ernest H. Hornsby
Farmer, Price, Hornsby &
Weatherford, L.L.P.
100 Adris Place
Dothan, AL 36303
ehornsby@fphw-law.com

Sybil Niden Goldrich
256 South Linden Drive
Beverly Hills, CA 90212
sybilg58@aol.com

Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of the Americas
New York, NY 10036
jtrachtman@kramerlevin.com

DEBTOR'S REPRESENTATIVES

Douglas Schoettinger
President and Manager
DCC Litigation Facility, Inc.
2200 W. Salzburg Road
P.O. Box 2089, Mail DCLF
Midland, MI 48686
doug.schoettinger@dowcorning.com

John C. Gorte
Global Director Corporate Insurance
and Risk Management
The Dow Chemical Company
1320 Waldo Ave., Suite 200
Midland, MI 48642
jcgorte@dow.com

Kevin W. Scroggin
Vice President & Executive Director
Corporate Risk Management
Dow Corning Corporation
2200 West Salzburg Road
Mail Stop CO1314
P.O. Box 994
Midland, MI 48686-0994
kevin.scroggin@dowcorning.com

David H. Tennant
Nixon Peabody LLP
Clinton Square, Suite 1300
Rochester, NY 14604
dtennant@nixonpeabody.com

SHAREHOLDER COUNSEL

Laurie Strauch Weiss
Orrick, Herrington &
Sutcliffe LLP
666 Fifth Avenue
New York, NY 10103-0001
lstrauchweiss@orrick.com