

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

In Re:

**Settlement Facility Dow Corning Trust,
Dow Corning Corporation,
Reorganized Debtor.**

Case No. 00-00005

Honorable Denise Page Hood

**ORDER REGARDING MOTION TO ENFORCE
APPLICATION OF TIME VALUE CREDITS UNDER THE
AMENDED JOINT PLAN OF REORGANIZATION AND RELATED DOCUMENTS**

I. BACKGROUND

On May 15, 1995, Dow Corning Corporation (“Dow Corning”) filed a chapter 11 bankruptcy action as a result of numerous personal injury claims involving its silicone gel breast implants and other related silicone products. After years of negotiations, primarily with the Tort Claimants’ Committee, an Amended Joint Plan of Reorganization (“Plan”), dated February 4, 1999, was confirmed by the Bankruptcy Court which became effective on June 1, 2004. (Bankr. Case No. 95-20512, Confirmation Order dated November 30, 1999 and Order Establishing Effective Date dated April 2, 2004)

The Plan established the Settlement Facility and the Litigation Facility for liquidation of Personal Injury Claims against Dow Corning. (Plan, § 5.3) All assets of the Settlement Facility shall be received, held, invested and disbursed by the Depository Trust on behalf of the Settlement Facility. (*Id.*) The Plan required Dow Corning to pay the funds for liquidating the Personal Injury Claims to the Depository Trust. (*Id.*) In order to establish the Settlement Facility, Dow Corning was required to execute and deliver a Funding Payment Agreement (“FPA”). (*Id.*) The total scheduled payments by Dow Corning under the FPA is up to \$3,172,000,000 with a Net Present Value

(“NPV”), as of the Effective Date, of \$2.35 billion. (*Id.*) The initial cash payment by Dow Corning under the Plan was \$985 million and any interest accrued on \$905 million of the initial payment under the FPA. (*Id.*)

The Plan provides that in the event an appeal is filed from the Confirmation Order raising a Release/Funding Issue, which occurred in this matter, the funds paid to the Settlement Facility shall be held in escrow pending the outcome of the appeal, with any interest accruing thereon to be held as part of the fund. (Plan, § 7.4) If the appeal does not result in a reversal of the Confirmation Order, the remaining escrowed funds, including the accrued interest thereon, shall be disbursed in accordance with the Plan. (*Id.*)

The FPA states that, “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% to the Effective Date.” (FPA, § 2.01) The FPA obligates Dow Corning to make payments over 16 annual funding periods if and as necessary to pay the allowed amount of eligible claims, with an Annual Payment Ceiling for each Funding Period. (FPA, § 2.01(b)) The Funding Period commenced “on the first anniversary of the Effective Date of the Plan,” the first anniversary being June 1, 2005. (*Id.*)

Dow Corning’s obligations under each of the 16 annual funding periods is set forth in Section 2.02 of the FPA. From and after the commencement of Funding Period 1 (June 1, 2005), the FPA requires the Claims Administrator of the Settlement Facility to deliver to Dow Corning a “Projected Funds Notice” which sets forth the expected amount required by the Settlement Facility to pay its expenditures, not to exceed the applicable Annual Payment Ceiling, as adjusted pursuant to the FPA for such Funding Period. (FPA, § 2.02) Thereafter, the Claims Administrator is required

to provide an “Actual Expenditures Notice” commencing with the second month of Funding Period 1. (FPA, § 2.02(b)) The amount of the Actual Expenditures Notice shall not exceed the amount by which the applicable Annual Payment Ceiling, as adjusted pursuant to the FPA for such Funding Period, exceeds previous payments in such Funding Period by Dow Corning. (FPA, § 2.02(b)(i)) In the event that Dow Corning objects to an Actual Expenditures Notice, it must pay the amount set forth in the Actual Expenditures Notice, but Dow Corning is entitled to seek Court review of the Actual Expenditures Notice. (FPA, § 2.02(b)(ii)) The Annual Payment Ceiling shall not limit the amount of Insurance Proceeds to be paid to the Settlement Facility during any Funding Period. (FPA, § 2.02(c)) Insurance Proceeds received by the Settlement Facility not previously allocated shall be credited against Annual Payment Ceilings as they become due and payable, except with respect to the adjustments required by Section 2.03. (*Id.*) Each Annual Payment Ceiling shall be increased to account for the difference in value between the Net Present Value as of the Effective Date of the annual Payment Ceiling for the preceding Funding Period and the net present value as of the Effective Date of payments actually made during such Funding Period. (FPA, § 2.02(f))

Adjustments to the Annual Payment Ceilings are required if the Settlement Facility receives Excess Insurance Proceeds in excess of the Annual Payment Ceiling during the period from the day after the Effective Date until the end of Funding Period 1 and during Funding Period 2. (FPA, § 2.03(a)) Section 2.03(b) sets forth the methodology for how the Annual Payment Ceilings shall be calculated as it relates to the Excess Insurance Proceeds. The Claims Administrator, with the assistance of the Finance Committee, calculates the adjustments to each Annual Payment Ceiling relating to the Excess Insurance Proceeds. (FPA, § 2.03(c)) Each party may file written objections to the Claims Administrator’s determination of any such adjustments which the Court will resolve.

(Id.)

Other than adjustments required for Excess Insurance Proceeds in Section 2.03, the Claims Administrator, with the assistance of the Finance Committee, will calculate the adjustments, if any, to the Annual Payment Ceilings. (FPA, § 2.05(a)) To the extent that an adjustment is required to an Annual Payment Ceiling and the Claims Administrator has not made a determination, a party may request the Claims Administrator to make such a determination as to the next Annual Payment Ceiling on or before sixty days prior to the beginning of the Funding Period for which the party reasonably believes that such a change is required. A party may file a written objection to the Claims Administrator's determination of any adjustments to, or a decision not to adjust, Annual Payment Ceilings, within thirty days of receipt of such determination. Any objections will be resolved by the Court. (FPA, § 2.05(b)-(c))

On October 21, 2004, Dow Corning requested the Claims Administrator to adjust the Annual Payment Ceilings for Funding Periods 1-3 and Funding Periods 5-8 as required by the FPA, by crediting the Ceilings with certain Advance Payments and Time Value Credits in accordance with Sections 2.01(a), 2.03 and 2.05 of the FPA. (Dow Corning Motion, Ex. 7) Specifically, Dow Corning sought credit for: 1) the Time Value Credit for the \$985 million Initial Payment; 2) the Time Value Credit for transfers of insurance proceeds to the Depository Trust in the period immediately following the Effective Date; 3) the Time Value Credit for various transfers to the Depository Trust of insurance proceeds received by Dow Corning after the Effective Date; and, 4) credit for the amount paid to Class 4A Claims. *(Id.)*

The Claimants' Advisory Committee ("CAC") objected to certain components of Dow Corning's request, including: 1) the Time Value Credit for the Initial Payment; 2) the Time Value

Credit for the insurance received prior to the Effective Date, to the extent that it carries forward the Time Value Credit beyond the beginning of Funding Period 1; and, 3) the Time Value Credit in connection with a non-insurance payment, namely the more than \$2 million net amount transferred from MDL 926 in June 2004. (Dow Corning Motion, Ex. 8) There was no substantive response by the then-Claims Administrator, E. Wendy Trachte-Huber, and the Finance Committee, and the parties agreed to attempt to resolve their differences. (Dow Corning Motion, Exs. 9-11) After discussions, Dow Corning and the CAC did not resolve the matter.

On March 5, 2008, Dow Corning again requested that the then-Claims Administrator, David Austern, adjust the Annual Payment Ceilings to account for the Advance Payments. (Dow Corning Motion, Ex. 12) Specifically, Dow Corning requested: 1) the Time Value Credit for the Initial Payment of \$985 million; 2) the Time Value Credit for insurance proceeds for distribution to Class 6D of \$18,400,000; 3) the Time Value Credit for Class 4A payment of \$7.2 million made on June 10, 2004; 4) the Time Value Credit for insurance proceeds transferred in the aggregate of \$211,456,278 in June 2004; 5) the Time Value Credit for the cash payment from the MDL-926 Facility transferred on June 8, 2004; and, 6) the Time Value Credit for other post-effective date payments of excess insurance proceeds totaling \$246,618,724 transferred after the Effective Date through December 31, 2007. (*Id.*)

The CAC objected to the request, arguing that it would be premature to calculate adjustments to the Annual Payment Ceilings before the end of Funding Period 4. (Dow Corning Motion, Ex. 13) Specifically, the CAC objected to: 1) the Time Value Credit for the Initial Payment; 2) the Time Value Credit for insurance received prior to the Effective Date to the extent that it carries forward the credit beyond the beginning of Funding Period 1; 3) the Time Value Credit for the \$18.4 million

paid to the Class6D Settlement; and, 4) the Time Value Credit in connection with non-insurance payments, i.e., the more than \$2 million net amount transferred from MDL-926 and \$7.2 million paid directly to Class4A Claimants in June 2004. The CAC does not object conceptually to Dow Corning's claimed credits, subject to confirmation of proper calculations, except for the noted items. (*Id.*)

The Claims Administrator issued a memorandum outlining his understanding of the parties' positions and areas of agreement and disagreement on July 30, 2008. Since that time, the parties have been unable to resolve the dispute. The Claims Administrator has yet to adjust or decline to adjust any Annual Payment Ceiling, as requested by Dow Corning. According to Dow Corning, because the Finance Committee and Dow Corning require certainty regarding the payment obligations, Dow Corning filed the instant motion on January 8, 2010. The CAC filed a response on February 12, 2010. Dow Corning filed a reply on March 2, 2010. A hearing was held on the matter.

II. ANALYSIS

A. Standard of Review

The Court retains jurisdiction over the Plan "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow, disallow, estimate, liquidate or determine any Claim, including Claims of a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, §§ 8.7.3, 8.7.4, 8.7.5)

Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). In interpreting a confirmed plan, courts use contract principles, since the plan is

effectively a new contract between the debtor and its creditors. *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); *see, Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir.1993). State law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written, regardless of whether it is in line with parties' prior obligations. *In re Dow Corning*, 456 F.3d at 676. A term is deemed ambiguous when it is "capable of more than one reasonable interpretation." *Id.* The Court has no authority to modify this language. Although bankruptcy courts have broad equitable powers that extend to approving plans of reorganization, these equitable powers are limited by the role of the bankruptcy court, which is to "guide the division of a pie that is too small to allow each creditor to get the slice for which he originally contracted." *Id.* at 677-78 (quoting *In re Chicago*, 791 F.2d 524, 528 (7th Cir.1986)). "A bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code." *Id.* at 678 (citing *In re Highland Superstores, Inc.*, 154 F.3d 573, 578-79 (6th Cir.1998)).

New York law governs the interpretation of the Plan. (Plan, § 6.13) Under New York law, a court must first decide whether the contract is ambiguous. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 595 (6th Cir. 2001). A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties. *Vintage LLC v. Laws Constr. Corp.*, 13 N.Y.3d 847, 849 (2009). Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous. *Innophos, Inc. v. Rhodia, S.A.*, 10 N.Y.3d 25, 29 (2008). Ambiguity is present if language was written so

imperfectly that it is susceptible to more than one reasonable interpretation. *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004). The objective is to determine the parties' intention at the time they entered into the contract as derived from the language used in the contract. *Id.* The intent is to be gleaned from the document as a whole in order to avoid excessive emphasis being placed upon particular words or phrases. *South Rd. Assoc., LLC v. International Bus. Machs. Corp.*, 4 N.Y.3d 272, 277 (2005). “[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004).

B. Time Value Credits Sought by Dow Corning

Dow Corning seeks an order enforcing the Plan, specifically, “confirming” that Dow Corning is entitled to receive Time Value Credits calculated at an interest rate of 7% per annum, compounded annually, against its annual Plan funding obligations for certain *pre*-Effective Date and other funding payments it has made through September 30, 2009, in accordance with the methodology set forth by Paul J. Hinton in his Declaration. Dow Corning argues that confirmation of its right to the Time Value Credit is essential to ensure that the Plan’s \$2.35 billion Net Present Value payment cap is not exceeded. Eight categories of payments applying the Time Value Credits are at issue according to Dow Corning, totaling \$370,087,085 through September 2009:

Pre-Effective Date Payments-

- 1) Initial Payment of \$985 million;
- 2) Class 6D claims paid of \$18.4 million;

Post-Effective Date Payments-

- 3) Insurance Proceeds of \$211,456,278 transferred in June 2004;
- 4) MDL 926 transfer of \$2.9 million in June 2004 to access MDL materials;
- 5) MDL 926 transfer to the Settlement Facility of \$2,176,572 on June 8, 2004 and \$4,084 on September 8, 2004;
- 6) Class 4A payment of \$7.2 million on June 10, 2004;
- 7) Excess Insurance Proceeds after the Effective Date of \$214,363,369; and,

8) Insurance Proceeds in Funding Period 3 of \$57,736,990.

Each of the requested Time Value Credit is addressed below.

C. Pre-Effective Date Payments--Initial and Class 6D Payments (Items 1 and 2)

Dow Corning argues that because Dow Corning paid the Initial Payment in several installments in 2001 (and one additional installment in 2004), nearly three years before the Effective Date and not on the Effective Date, the Time Value Credit must be calculated for the Initial Payment. Dow Corning claims that had the Initial Payment been made on the Effective Date, as the FPA schedule contemplates, there would have been no need to calculate a Time Value Credit on this payment and the Class 6D payment made prior to the Effective Date. Dow Corning asserts that the Time Value Credit must be calculated in order to ensure that the Net Present Value not exceed \$2.35 billion as of the Effective Date.

The CAC responds that the Plan documents provide that Dow Corning receive a Time Value Credit to compensate for the lost earning power of certain insurance funds that it contribute to the Depository Trust *post*-Effective Date but ahead of the Plan's funding schedule. The CAC argues that Dow Corning's attempt to claim a similar credit for having transferred the Initial Payment into escrow *pre*-Effective Date is inconsistent with the Plan and the parties' intentions and conduct.

Reviewing the Plan documents, including the FPA, the Court's interpretation of the parties' agreement is that the Time Value Credit does not apply to any funds paid as part of the Initial Payment made by Dow Corning *pre*-Effective Date. "Initial Payment" is defined as Dow Corning's initial payment of "\$985,000,000." (FPA, § 2.01(a)) The term "Time Value Credit" appears only in certain sections of the FPA. Nothing in the FPA provides that Dow Corning is entitled to Time Value Credit for the Initial Payments made by Dow Corning held in escrow *pre*-Effective Date.

Section 7.4 of the Plan does not address Time Value Credit for any funds held in escrow pending the outcome of an appeal. Section 7.4 only states that any interest accruing thereon is to be held as part of the fund. (Plan, § 7.4) There is no provision in the Funding Payment of the Initial Payment section of the FPA allowing Dow Corning Time Value Credit on any Initial Payment made. (*See*, FPA §§ 2.01 and 2.01(a)) Nothing in the Depository Trust Agreement refers to Dow Corning receiving Time Value Credit on any payments made *pre*-Effective Date. (*See*, Second Amended and Restated Depository Trust Agreement (“DTA”)) Specifically, the Funding section of the Depository Trust Agreement makes no mention of any Time Value Credit to Dow Corning. (DTA § 4.01) The Depository Trust Agreement expressly notes that any interest earned by Dow Corning on the Initial Payment from April 30, 1999 to the date of transfer will be transferred to the Depository Trust. (DTA, § 4.01(a)(i))

Dow Corning also seeks Time Value Credit for all of its “Advance Payments” made prior to the Effective Date, specifically Class 6D Payments in Section 2.10 of the FPA. As noted above, there is nothing in the Plan or the FPA which authorizes Time Value Credit for Advance Payments. Section 2.10 does not refer to Time Value Credits. Section 2.10 only allows Dow Corning credit for payments to Class 6A-6D Funds. Unless specifically addressed in the FPA, Dow Corning is not entitled to Time Value Credits on the Class 6D Payments.

Dow Corning’s argument that it is entitled to Time Value Credit on the Initial Payment and the Class 6D Payment is not supported by any of the Plan documents. If the parties intended to apply the Time Value Credit to the Initial Payment or to any *pre*-Effective Date payments, such as the Class 6D Payment, the parties could have expressly noted the Time Value Credit in the appropriate section of the FPA or the DTA or any other section of the Plan documents. The DTA

expressly noted that any interest earned by Dow Corning on the Initial Payment would be transferred to the Depository Trust. Why then is there not a mention of a Time Value Credit on the Initial Payment prior to the pre-effective date, unless, as argued by the CAC, the parties did not intend that Time Value Credit be applied on the Initial Payment. The parties knew to use the term “Time Value Credit” in certain sections of the FPA, but yet the parties did not use the term “Time Value Credit” when the FPA and the DTA discussed the Initial Payment and the transfer to the Depository Trust. The 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. The parties are also clear in their intent regarding the Funding Period and Annual Payment Ceiling schedule. (FPA, § 2.01(b)) The Annual Payment Ceiling is subject to adjustment “as provided in this Agreement,” meaning the FPA (*Id.*; Introductory Paragraph) The adjustments involving Time Value Credit do not appear in the Initial Payment transfer provision but appear in the FPA in sections involving insurance proceeds. (FPA, §§ 2.01(b), 2.02(d), 2.03(b) and 2.04(c)) Neither the FPA nor any other Plan document provide for Time Value Credit on the Initial Payment or the *pre*-Effective Date payment to Class 6D. The Court will not read such a requirement into the contract between the parties. *See, Vermont Teddy Bear*, 1 N.Y.3d at 475. The Court denies Dow Corning’s request for Time Value Credit on the Initial Payment and the Class 6D Payment.

D. Post-Effective Date Payments

1. Insurance Proceeds of \$211,456,278 transferred in June 2004 (Item 3)

The FPA provides that Dow Corning is entitled to Time Value Credit on Insurance Proceeds held by Dow Corning on the Effective Date which were received by Dow Corning before the Effective Date, Dow Corning is entitled to a Time Value Credit. (FPA, § 2.01(a)(ii)) Specifically,

the FPA provides,

Insurance Proceeds held by Dow Corning on the Effective Date shall be held in trust for the benefit of the Trust and paid to the Trust 90 days after the Effective Date and credited against the Annual Payment Ceiling for Funding Period 1, *together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of such excess by the Settlement Facility until the beginning of Funding Period 1.* To the extent the amount to be credited (*including the Time Value Credit*) exceeds the Annual Payment Ceiling for Period 1, such excess shall be credited against the Annual Payment Ceiling for Funding Period 2.

(FPA, § 2.01(a)(ii)).

Based on Section 2.01(a)(ii), Dow Corning is entitled to a Time Value Credit for Insurance Proceeds held by Dow Corning prior to the Effective Date for the benefit of the Trust. The Time Value Credit for the Insurance Proceeds is to be calculated at a rate of 7% per annum from the date of receipt by the Settlement Facility until the beginning of Funding Period 1. The Insurance Proceeds with the Time Value Credit are to be credited against the Annual Payment Ceiling for Funding Period 1. If the amount to be credited exceeds the Annual Payment Ceiling for Funding Period 1, the excess shall be credited against the Annual Payment Ceiling for Funding Period 2.

(FPA, § 2.01(a)(ii)) The FPA clear is that Dow Corning is entitled to Time Value Credit on Insurance Proceeds upon receipt by the Settlement Facility only until the beginning of Funding Period 1, to be credited, if in excess of the Annual Payment Ceiling for Funding Period 1, against the Annual Payment Ceiling for Funding Period 2. The Court grants Dow Corning's request for Time Value Credit on Insurance Proceeds but only as expressly noted above.

2. MDL 926 transfer of \$2.9 million in June 2004 to access MDL materials; MDL 926 transfer to the Settlement Facility of \$2,176,572 on June 8, 2004 and \$4,084 on September 8, 2004; and Class 4A payment of \$7.2 million on June 10, 2004 (Items 4, 5, and 6);

Reading the FPA and the related Plan documents, the parties did not expressly provide for any Time Value Credits on MDL transfers or Class 4A payments. As noted above, the Time Value Credits only appear at certain sections of the FPA. The parties knew to use the term at those sections. If the parties intended to calculate Time Value Credits on the MDL transfers or the Class 4A payment, the parties could have easily agreed to amend any of the Plan documents to so reflect or to enter into a separate agreement indicating such credits. The Court will not read into the FPA or any other Plan documents the requirement to calculate Time Value Credits on the MDL transfers and Class 4 payment. The Court denies Dow Corning's request for Time Value Credit on the MDL transfers and the Class 4A payment.

3. Excess Insurance Proceeds after the Effective Date of \$214,363,369 (Item 7)

The CAC does not object to Dow Corning's Time Value Credit calculation for Excess Insurance Proceeds after the Effective Date so long as the calculations meet the express language set forth in §§ 2.02 and 2.03.

The Time Value Credit term appears in Section 2.02(d) of the FPA relating to the Funding of Annual Payment Ceiling Obligations. This section addresses the situation of cash and Insurance Proceeds received by the Settlement Facility *after* the Funding Period 2. Specifically, the FPA states,

In any Funding Period after Funding Period 2 in which the total amount of cash and Insurance Proceeds received by the Settlement Facility exceeds the applicable Annual Payment Ceiling (as adjusted to Section 2.03-2.05), the excess over the Annual Payment Ceiling will be credited against the Annual Payment Ceiling in the next Funding Period(s), *together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of the excess by the Settlement Facility until the beginning of the next Funding Period.*

(FPA, § 2.02(d)) The Court's reading of Section 2.02(d) reveals that *after Funding Period 2*, Dow Corning is entitled to Time Value Credit on any cash and Insurance Proceeds received by the Settlement Facility *exceeding* that Funding Period Annual Payment Ceiling. The Time Value Credit is to be calculated at the rate of 7% per annum from the date the Settlement Facility receives the excess cash and Insurance Proceeds until the beginning of the next Funding Period.

Time Value Credit is also addressed in Section 2.03 relating to "Excess Insurance Proceeds."

"Excess Insurance Proceeds" is defined as,

Insurance Proceeds in excess of the Annual Payment Ceiling received by the Settlement Facility during the following time periods:

(i) During the period from the day after the Effective Date until the end of Funding Period 1, Insurance Proceeds in excess of the Annual Payment Ceiling for Funding Period as adjusted pursuant to Section 2.01(a)(ii);

(ii) During Funding Period 2, Insurance Proceeds in excess of the Annual Payment Ceiling for Period 2 as adjusted pursuant to Section 2.01(a)(ii).

(FPA, § 2.03(a)) So as to maintain a Net Present Value for the aggregate maximum payments of \$2,350,000,000, Excess Insurance Proceeds shall be credited against future Annual Payment Ceilings set forth in Section 2.03, discounted at the rate of 7% per annum, to the Effective Date.

(FPA, § 2.03(b)) To achieve the Net Present Value, the amount of such credit must equal the amount of the Excess Insurance Proceeds plus an additional amount, the Time Value Credit. The Time Value Credit is to be calculated at the rate of 7% per annum, compounded annually, from the date of receipt of the Excess Insurance Proceeds until the first day of the Funding Period for the Annual Payment Ceiling to which they are to be credited becomes due. (*Id.*) Excess Insurance Proceeds with the applicable Time Value Credit, will be credited against the Annual Payment Ceilings due

in each of the Funding Periods 5 through 8, proportionally. (*Id.*) If the amount to be credited in this section relating to Excess Insurance Proceeds exceeds the relevant Annual Payment Ceiling obligation, the excess amount will be credited against Annual Payment Ceilings due in the immediately succeeding Funding Period(s) including any applicable Time Value Credit. (*Id.*)

The FPA then addresses in Section 2.04 Dow Corning's right to modify the Annual Payment Ceilings if Excess Insurance Proceeds are received by the Settlement Facility during the period from the day after the Effective Date until the end of the Funding Period 1 or during Funding Period 2. (FPA, § 2.04) Section 2.04 gives Dow Corning the right to elect to reduce the Annual Payment Ceiling for Funding Periods 2, 3 and/or 4 if certain conditions are met. The notice of Dow Corning's election must be delivered not less than 15 days prior to the commencement of the applicable Funding Period to reduce the Annual Payment Ceiling for Funding Periods, 2, 3 and/or 4. Dow Corning makes no argument regarding its right to elect modification under Section 2.04 of the FPA, accordingly, the Court will not address the issue of the Time Value Credit set forth in this Section. Dow Corning is entitled to Time Value Credit on Excess Insurance Proceeds but only as expressly noted above.

4. Insurance Proceeds in Funding Period 3 of \$57,736,990 (Item 8)

After review of the FPA, this Court concludes that Dow Corning is not entitled to Time Value Credit for Insurance Proceeds in Funding Period 3. As noted above, the FPA only addresses Excess Insurance Proceeds as to Funding Periods 1 and 2. There are no other provisions in the FPA addressing Funding Period 3. The Court will not read into the FPA, or any other Plan documents, the requirement that Dow Corning is entitled to Time Value Credit for Insurance Proceeds in Funding Period 3. *See, Vermont Teddy Bear*, 1 N.Y.3d at 475.

E. Summary

Dow Corning is entitled to Net Present Value adjustments, which are also at a discount rate of 7% per annum. Dow Corning's motion attempts to "lump" together both the Net Present Value rate and the Time Value Credit rate—meaning that Dow Corning is entitled to both. The FPA only mentions Time Value Credit in certain instances, as noted above. Dow Corning is not entitled to Time Value Credit, other than as specifically noted above. The FPA is unambiguous. If the parties intended to credit Dow Corning with Time Value Credit in its Advance Payments and other payments, the FPA would have so specifically indicated. The parties are clear in their intent that only certain funds are allowed Time Value Credit. Dow Corning argues that without applying the Time Value Credit, Dow Corning's funding of the Plan will exceed the \$2.35 billion cap Net Present Value. The Claims Administrator has not made a determination on the Annual Payment Ceiling, therefore, this argument is speculative at this time, although certain ongoing calculations have been made and presented to the Court as to the Net Present Value issue.

Given that the Claims Administrator has yet to make a determination as to the Annual Payment Ceiling issue as noted in Section 2.05(b)-(c) and Dow Corning in its motion seeks an order that the Claims Administrator should do so, the Court directs the Claims Administrator to calculate the Annual Payment Ceiling, taking into account only the Time Value Credits noted above. The parties do not disagree on the methodology and calculations submitted by Dow Corning, but only disagree as to which specific items the Time Value Credit should be applied. The Court has so ruled.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Dow Corning's Motion to Enforce Application of Time Value Credits under the Amended Joint Plan of Reorganization and Related Documents (**Doc. No. 714, filed 1/8/2010**) is GRANTED IN PART and DENIED IN PART, as set forth above.

IT IS DIRECTED that the Claims Administrator calculate the Time Value Credits as to the Insurance Proceeds of \$211,456,278 transferred in June 2004 (Item 3) and Excess Insurance Proceeds after the Effective Date of \$214,363,369 (Item 7) and, accordingly, adjust the applicable Annual Payment Ceilings. The methodology and calculations submitted by Dow Corning may be used (given that the Claimants' Advisory Committee does not necessarily object to the calculations), as long as the Time Value Credits calculations are made as expressly noted in this Order. The Claims Administrator and the parties must meet and confer as to the date the parties will submit an update to the Court and will thereafter so inform the Court.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: November 28, 2011