UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

REPLY IN FURTHER SUPPORT OF MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR ORDER RESOLVING DISPUTE REGARDING TREATMENT OF INITIAL PAYMENT

The CAC respectfully submits this Reply in further support of its Motion seeking a definitive ruling regarding the treatment of the Initial Payment.[1]

PRELIMINARY STATEMENT

Dow Corning does not dispute that the parties have a ripe controversy and require a definitive ruling on the appropriate treatment of the Initial Payment. Nor does it dispute that this Court's affirmed ruling rejecting a TVC for the Initial Payment is now the law of the case – eliminating the *only* basis that Dow Corning ever asserted, before now, for a present value adjustment. And Dow Corning again confirms its prior understanding 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." Dow Opp. 7. That method of adjustment has now been definitively rejected, and Dow

[1] Defined terms have the meanings assigned in the CAC's opening memorandum ("CAC Br.") or Dow Corning's Opposition ("Dow Opp.").

Corning's post hoc scrambling for a new theory fails to rebut the CAC's key arguments:

First, Dow Corning does not justify treating the transfer of the Initial Payment from one restricted escrow account to another as a "payment" under the Plan. Dow Corning misleadingly suggests that the Settlement Facility had the full right to use these funds prior to the Effective Date, when, in fact, the funds were transferred conditionally, subject to tight restrictions, and would be *returned* to Dow Corning if Plan confirmation was reversed on appeal.

Second, Dow Corning cannot square its attempt to recoup the time value of the Initial Payment with its agreement to assign that same value to tort claimants. Though Dow Corning refers to its obligation to *pay* interest, the Plan documents more specifically require Dow Corning to turn over to the Trust the interest that it actually *earned* between April 30, 1999 and the date of transfer. That interest represents *the time value of the funds*, and Dow Corning's agreement to commit that value to tort claimants bars it from reclaiming the same value through a funding stream adjustment.

Finally, Dow Corning does not even try to explain how the parties could have intended to deny a TVC for the Initial Payment but permit it to obtain the same result through mechanisms that would be available, if at all, only at or near the end of the Settlement Facility. The Plan requires timely, contemporaneous

projections to determine the Trust's ability to pay various categories of claims – a structure that renders Dow Corning's new interpretation of the Plan documents wholly illogical. Though the Court of Appeals left open the possibility that Dow Corning could claim such a credit through the end-of-facility mechanisms, it did not address whether such a reading of the Plan documents made any sense.

Contrary to Dow Corning's assertion, granting this Motion will resolve the funding uncertainty that has, to date, prevented the Finance Committee from recommending the approval of full Premium Payments. (The Finance Committee's pending motion to authorize *partial* premiums does not depend on the outcome of this Motion.) Dow Corning's threat to continue litigating over premiums even if its $200 million adjustment is finally rejected is empty posturing. As the Court well knows, the Independent Assessors' most pessimistic projections show full Premium Payments only slightly exceeding available funding even *with* Dow Corning's claimed credit in place. The additional $200 million NPV – which will ultimately translate to more than $400 million in cash given the passage of time – would create a cushion large enough to eliminate any good faith argument that a future spike in claims could threaten the funding cap.[2]

[2] *See* Docket No. 825 (Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments) at 8-13; Docket No. 848 (Reply of Claimants' Advisory Committee in Further Support of Finance Committee's First Amended

While Dow Corning insists that the Plan documents do not "promise" Premium Payments (Dow Opp. 18), it cannot and does not deny that premiums were touted as a major selling point of the settlement, and claimants were indeed promised that premiums would be paid if sufficient funds were available. Dow Corning's own expert, Dr. Fred Dunbar, testified at confirmation that premiums "are going to be paid seven years from now" – *i.e.*, accounting for the delayed Effective Date, in 2011.[3] The CAC respectfully requests that the Court rule promptly on both the Finance Committee's pending motion and Dow Corning's anomalous claim for a time value adjustment in Year 16, so as to provide the certainty needed to authorize *full* Premium Payments while claimants are still alive to receive them.

ARGUMENT

I. DOW CORNING OFFERS NO EFFECTIVE RESPONSE TO THE ARGUMENT THAT THE TRANSFER OF THE INITIAL PAYMENT DID NOT CONSTITUTE A "PAYMENT"

Dow Corning barely mentions the CAC's threshold argument that the transfer of the Initial Payment from one highly restricted escrow to another should not be regarded as a "payment" for the benefit of tort claimants. Dow Corning

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Recommendation and Motion for Authorization to Make Partial Premium Payments) ("CAC Premium Reply") at 21-22.

[3] Docket No. 848-3 at 5 (June 29, 1999 Tr. at 303, attached as Ex. C to CAC Premium Reply).

states as "incontrovertible facts" 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." Dow Opp. 21. In fact, however, the Initial Payment was transferred into the Trust's nominal control subject to the significant condition that it would be returned if the Dow Corning Plan was not ultimately confirmed – a condition that prevented ownership of the funds from vesting in the Trust as a matter of law.[4] Moreover, only a small fraction of the escrowed funds could be spent on Settlement Facility administration, and only with further court permission and supervision. *No* funds could be used to pay claims. The transfer from one escrow to another therefore should not be considered a "payment" that could trigger a present value adjustment. The money was "paid" only on the Effective Date, *i.e.*, when it could be applied and used for claimants' benefit.[5]

Dow Corning's reference to the pre-Effective Date distribution of $18.4 million to Class 6-D Australian claimants (Dow Opp. 21-22) hardly proves that the

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[4] *See* Plan § 6.13 & FPA § 5.08 (choosing New York law as governing law); *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 659 (2d Cir. 1996) (placement of instrument into escrow "indicates that the grantor does not intend to transfer ownership until the occurrence of some condition"); *99 Commercial St., Inc. v. Goldberg*, 811 F. Supp. 900, 906 (S.D.N.Y. 1993) (Sotomayor, J.) (when funds are deposited with escrow agent, "the grantee does not obtain title until the condition is satisfied").

[5] *See* Docket No. 730 (CAC TVC Response) at 11-13.

Trust had unbridled control over the Initial Payment. Rather, it represents a single exception (implemented on court order without the TCC's agreement) to the general rule – embodied in both the law and the Plan documents – barring such early payments. That one transaction did not transform the highly regulated and restricted escrowing of funds into a "payment" under the Plan.

II. DOW CORNING DOES NOT EXPLAIN HOW IT CAN RECEIVE A TIME VALUE ADJUSTMENT FOR THE INITIAL PAYMENT WHEN IT AGREED TO COMMIT THAT VALUE FOR THE BENEFIT OF TORT CLAIMANTS

Dow Corning argues that the Plan documents do not reflect any "bargain" to assign the time value of the Initial Payment to tort claimants. Dow Opp. 20. But that bargain was expressly embodied in FPA Section 2.01(a), which required Dow Corning to turn over with the Initial Payment the actual interest it earned on $905 million of that amount between the Interest Accrual Date (later determined to be April 30, 1999) and the date of transfer. This provision crucially locked in the time value of most of the Initial Payment for the benefit of tort claimants in the anticipated event that appeals challenging Plan funding or third-party releases substantially delayed the Effective Date. Since the present value of Dow Corning's funding stream would be determined as of the eventual Effective Date, committing the time value of this portion of the Settlement Fund for the benefit of the Trust from a fixed date was an important hedge protecting the interests of tort claimants.

Dow Corning tries to obscure the nature of this bargain by referring repeatedly to having "paid" interest on the transferred funds (Dow Opp. 10, 14) – but FPA Section 2.01(a) makes clear that what Dow Corning really did was turn over the actual interest that it *earned* during the relevant period. That interest represents the time value of these funds to Dow Corning. Giving Dow Corning a seven percent credit for the same funds for the same period would undo the bargain embodied in Section 2.01(a).

Dow Corning has no answer to this point. It argues only that because the Plan documents expressly exclude from the calculation of Net Present Value the *interest* earned on the Initial Payment (as opposed to the underlying payment itself), the Court should infer that the parties intended to provide a time value adjustment for the Initial Payment. Dow Opp. 20. But that argument makes no sense. The interest earned on the Initial Payment *is* the time value of the Initial Payment. Assigning the actual interest earned during this period to the tort claimants necessarily implies that no other time value adjustment is appropriate with respect to the same money during the same period.

At most, the Plan documents' lack of an express statement regarding treatment of the Initial Payment is an example of imprecise drafting. Like any other contract, however, the Plan should be read as a consistent and coherent whole that gives meaning to all its terms and effectuates the intent of the parties. *See*

Diversified Energy, Inc. v. Tenn. Valley Auth., 223 F.3d 328, 339 (6th Cir. 2000). The CAC's reading of the Plan documents harmonizes both relevant provisions – FPA Section 2.01(a) (which assigns the time value of the Initial Payment to tort claimants) and Plan Section 7.4 (which requires transfer of the Initial Payment pending contemplated appeals, but conditions that transfer on ultimate confirmation of the Plan and restricts the uses to which the funds may be put). Reading these provisions together, it is apparent that Section 2.01(a) was intended to fix the economic treatment of the Initial Payment, while the transfer contemplated by Section 7.4 was intended to demonstrate Dow Corning's commitment to the Plan rather than being an event of economic significance.

In contrast, Dow Corning's reading – excluding the "interest" from the time value calculation but not the "principal" of the Initial Payment – is wholly illogical: It would shift back to Dow Corning the very benefit promised to tort claimants in Section 2.01(a) while creating a disincentive to effectuate the transfer contemplated in Section 7.4, because tort claimants would have been better off continuing to accrue interest and transferring the funds only on the Effective Date.

In short, the two sections are best harmonized by treating the Initial Payment as being "paid" on the Effective Date regardless of when the Funds were physically transferred. Contrary to Dow Corning's assertion that the CAC's reading "has no textual underpinning in the Plan Documents or in reality" (Dow

Opp. 5-6), the CAC's reading gives meaning to all Plan provisions and effectuates the parties' intent to commit the time value of the Initial Payment to tort claimants as of April 1999.

III. DOW CORNING CANNOT EXPLAIN WHY AFFIRMANCE OF THIS COURT'S DECISION DOES NOT RENDER ITS READING OF THE PLAN DOCUMENTS EVEN MORE ILLOGICAL

Even if a time value adjustment for the Initial Payment were not barred on the foregoing grounds, as the Plan is structured such an adjustment could logically be available only through a TVC, which has been ruled unavailable.

As the Court knows, to determine the earliest appropriate time to authorize the payment of certain categories of claims, the Plan calls for regular monitoring of claim flow, status reports concerning Plan funding, and periodic projections of future claims. In particular, the Plan contemplates that, after several years of claims experience, payment of all future claims would be sufficiently assured to permit approval of Premium Payments, which were widely publicized to claimants to induce them to vote for the Plan. *See* CAC Br. 4-6. This basic structure works only if the parties can take account – on a contemporaneous basis – of available information requiring adjustments to the funding stream. Thus, where large adjustments were contemplated, the Plan specifically described how they should be accounted for. For example, because the parties contemplated certain insurance proceeds becoming available on an accelerated basis (entitling Dow Corning to

present value adjustments), they specifically bargained to spread out the impact of such adjustments over several years so as to minimize interference with the Settlement Facility's cash flow. *See* FPA § 2.03(b) (describing allocation of TVCs for Excess Insurance Proceeds). FPA Section 2.03(c) provides that such adjustments to Annual Payment Ceilings are to be calculated near the end of Funding Period 4.

Whether Dow Corning would be entitled to an adjustment based on the timing of the Initial Payment was and is a matter of at least equal potential impact on Plan funding. Because the parties contemplated lengthy appeals challenging the Plan's funding and release provisions, it was foreseeable that the Effective Date might not occur for several years after the Initial Payment was transferred – creating a potentially huge adjustment if the parties intended for Dow Corning to receive an NPV credit for the Initial Payment. But had they so intended, the parties would have included in the Plan a mechanism for recognizing that credit promptly – thereby providing clarity in the process of projecting future fund availability – since that question would turn entirely on construction of the Plan documents and facts fixed as of the Effective Date. In other words, they would have provided for a *TVC* in connection with the Initial Payment, to be calculated and applied no later than those expressly provided for accelerated insurance payments. There was no reason for the parties to exclude the Initial Payment from

the TVC provisions if, indeed, they intended for Dow Corning to receive a time value adjustment based on the timing of the transfer.

However, this Court and the Court of Appeals have definitively ruled that the parties did *not* intend to provide Dow Corning a TVC in connection with the Initial Payment. Dow Corning now argues that it nevertheless should be permitted to claim an identical credit many years in the future – either when it believes it has actually hit the funding cap (under FPA Section 2.01(c)) or as part of the final "true-up" process (under FPA Section 2.05(a)(ii)). But Dow Corning does not explain why the parties would defer until the end of the Trust's life a question that was ripe on the Effective Date – particularly one that could have such a massive impact on available funding. The structure of the Plan requires that such credits be acknowledged and factored into future projections as soon as the information necessary to make the adjustments becomes available. Leaving a contingency to hang over the Trust for sixteen years serves no purpose, and because retroactively eliminating a massive amount of Plan funding could wreak havoc with the Trust's finances, prudent fiduciaries would have to assume that Dow Corning *will* receive such a credit in Year 16, thereby thwarting the Plan's intention to generate timely, reliable projections so as to permit the prompt payment of all categories of claims.

Dow Corning's failure to articulate how this needless delay in recognizing a present value adjustment for the Initial Payment can be squared with the basic

structure of the Plan defeats its attempt to capitalize on the opening left by the Sixth Circuit. Dow Corning's only argument is to invoke the principle of "*expressio unius est exclusio alterius*," under which the specification of certain categories in a contract may imply the exclusion of other terms of the same character related to the same matter. *See* Dow Opp. 15. Dow Corning argues that the two express exclusions from present value calculation (interest on the $905 million and any interest paid by Dow Corning on late payments) necessarily imply that every other payment under the Plan is subject to a present value adjustment.

As explained above at pages 7-9, a harmonized reading of the Plan documents yields the opposite conclusion: the assignment of the time value of the Initial Payment to the Trust after April 1999 necessarily implies that no further time value adjustment is appropriate with respect to the Initial Payment itself. Indeed, the *expressio unius* canon supports this Court's holding that, had the parties intended for Dow Corning to receive a TVC in connection with the Initial Payment, they would have expressly provided for it in the same manner as the FPA's detailed provisions governing accelerated insurance payments. The exclusion of the Initial Payment from these provisions supports the conclusion, now the law of the case, that Dow Corning is not entitled to a TVC. And the more general principle that the Plan documents should be read as a coherent whole to effectuate the intent of the parties leads to the further conclusion that, having

denied a TVC for the Initial Payment, the parties could not have intended to provide a similar adjustment at a much later time that would be less useful – and potentially disruptive – to the functioning of the Settlement Facility.

In this connection, it is not clear what Dow Corning is getting at in arguing that the true-up and termination provisions "are merely the *mechanisms* that implement the $2.35 billion net present value funding cap." Dow Opp. 17. Dow seems to be saying that the NPV cap principle is so important that it must be enforced even if the Plan does not provide a mechanism to do so. But the point of the meticulously negotiated Plan documents was to provide both substance and procedure to govern implementation of Dow Corning's settlement with the tort claimants. Those "mechanisms" were carefully considered and heavily negotiated. The absence of a "mechanism" here supports the CAC's argument that the parties did not intend for the timing of the transfer to have economic significance.

Dow Corning fails to explain how the parties could have intended to deny a TVC for the Initial Payment and yet permit it to claim an identical present value adjustment in Year 16. While the Sixth Circuit left open this possibility, it did not consider whether it made any sense, and Dow Corning's failure to provide a persuasive rationale consistent with the Plan defeats its current argument.

Finally, Dow Corning's seemingly irrelevant quibbles about its motivations in filing the Time Value Credit Motion further underscore the illogic of its current

position. Dow Corning says that it filed the motion not to resolve a contingency affecting Premium Payments but merely to "determine the proper methodology for calculating the amounts Dow Corning could be required to pay under the Annual Payment Ceilings." Dow Opp. 19. But the *reason* Dow Corning needed that determination was, in fact, to resolve contingencies affecting the timing of Premium Payments and other matters under the Plan. While Dow Corning first raised the TVC issue in 2004, before the issue of Premium Payments was ripe, it did not actually *file* the Time Value Credit Motion until years later – and then only at the request of this Court for the express purpose of resolving funding contingencies relevant to the Independent Assessor's projections. Dow Corning's statement that "Premium Payments were not even a tangential purpose" of the Time Value Credit Motion (*id.*) is simply false – a fact of which this Court may take judicial notice based on its own knowledge of the events in question.

Dow Corning has good reason to squirm on this subject: admitting that the Time Value Credit Motion was brought to resolve these funding contingencies underscores that the parties understood the TVC mechanism to be the *only* way for Dow Corning to receive such a credit and that the Court's ruling on the question would finally dispose of that question. It would have made no sense for Dow Corning to seek a ruling limited to the TVC issue and not present the larger question of whether it could ever be entitled to a present value adjustment for the

Initial Payment. The structure of the Plan, the conduct of the parties, and common sense all support the conclusion that the denial of a TVC for the Initial Payment reflects an overall intent to deny any adjustment for transfer of the Initial Payment.

CONCLUSION

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

Dated: New York, New York
September 27, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 27, 2013, I electronically filed a copy of the foregoing Reply in Further Support of 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.

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