Case No. 14-1090

United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION, DEBTOR'S REPRESENTATIVES, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED
***Interested Parties – Appellants*,**

v.

THE FINANCE COMMITTEE, CLAIMANTS' ADVISORY COMMITTEE
***Interested Parties – Appellees*.**

On Appeal from the United States District Court for the Eastern District of Michigan

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BRIEF OF APPELLANTS DOW CORNING CORPORATION, DEBTOR'S REPRESENTATIVES, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1090 Case Name: In re Settlement Facility - Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Dow Corning Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.
See answer to No. 2

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.
Dow Corning Corporation is 50% owned by Corning Incorporated and 50% owned by Dow Holdings, Inc., a wholly-owned subsidiary of The Dow Chemical Company. Further, various publicly-owned corporations may be creditors of Dow Corning's Chapter 11 bankruptcy estate, but Dow Corning believes their interests are too attenuated to present any conflict issues here.

CERTIFICATE OF SERVICE

I certify that on April 23, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Dickstein Shapiro LLP
1825 Eye Street, NW, Washington, DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1090 Case Name: In re Settlement Facility - Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Debtor's Representatives
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.
The Debtor's Representatives consist of: two who are officers and employees of Dow Corning Corporation; one who is counsel to Dow Corning Corporation; one who is counsel to Corning Incorporated; and one who is an employee of The Dow Chemical Company.

CERTIFICATE OF SERVICE

I certify that on April 23, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
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1825 Eye Street, NW, Washington, DC 20006

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1090

Case Name: Dow Corning Corp., et al. v. Claimants' Advisory Committee, et al.

Name of counsel: Laurie Strauch Weiss

Pursuant to 6th Cir. R. 26.1, The Dow Chemical Company
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.
The Dow Chemical Company ("TDCC") has no parent companies, and no other publicly held company owns 10% or more of TDCC's stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 23, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Laurie Strauch Weiss

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1090 Case Name: In re Settlement Facility Dow Corning

Name of counsel: David H. Tennant, Nixon Peabody LLP

Pursuant to 6th Cir. R. 26.1, Corning Incorporated
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 23, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ David H. Tennant

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the Court in its decision. Oral argument is particularly important here, where the district court erroneously interpreted the unambiguous standards in the Plan of Reorganization governing the distribution of lower priority payments (Second Priority Payments) and, as a result, more than $100 million in Premium Payments is being distributed during the pendency of this appeal while thousands of claimants have yet to receive higher priority First Priority Payments.

INTRODUCTION

This appeal arises out of the district court's order authorizing the distribution of over $100 million in supplemental Premium Payments (only one of three categories of Second Priority Payments) in clear contravention of the Amended Joint Plan of Reorganization (the "Plan") to thousands of claimants who have already received substantial First Priority Payments and while tens of thousands of other claimants remain eligible to claim, but have not received, First Priority Payments. *See* 12/31/13 Memorandum Opinion and Order Regarding Partial Premium Payment Distribution By The Finance Committee ("Order"), RE #934. That decision violates the Plan because it is premised on several fundamental legal errors: (1) the district court erred by ordering payment of just one of three categories of Second Priority Payments, thereby demoting the other categories notwithstanding that the Plan, the Settlement Facility and Fund Distribution Agreement ("SFA") and other Plan Documents[1] mandate parity among all

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[1] The SFA is a Plan Document that was executed by Dow Corning and the Claimants' Advisory Committee. The Plan defines "Plan Documents" as

> the Settlement Facility Agreement, the Dow Corning Settlement Program and Claims Resolution Procedures, the Litigation Facility Agreement, the Funding Payment Agreement . . . the Depository Trust Agreement . . . and all other documents and exhibits . . . that aid in effectuating this Plan . . . .

Plan, RE #826-3, Page ID #13331-32, §1.131.

categories of Second Priority Payments and violating the Bankruptcy Code which prohibits modification to the confirmed Plan and unequal treatment of equal priority claims; (2) the district court misconstrued the plain language of the Plan's and SFA's standard for authorizing Second Priority Payments and instead applied a lower standard borrowed from another provision of the Plan and Plan Documents; (3) the district court misconstrued the Plan and SFA by assuming the availability of assets that are not permitted for use in financing Premium Payments or are currently in dispute; and (4) the district court denied Dow Corning Corporation ("Dow Corning"), the Debtor's Representatives and the Shareholders[2] (collectively, "Appellants") a meaningful opportunity to be heard in violation of the Plan and SFA.

Appellants respectfully request that this Court reverse and vacate the district court's order on account of these numerous errors. Appellants further request that this Court remand with instructions to the district court that it only authorize Second Priority Payments if there is "assurance" that all First Priority Payments will be made and, in doing so, clarify that if such assurance exists, the Finance Committee cannot discriminate among Second Priority Payments and instead must make all such payments in equal proportion and at the same time, that the

[2] The Shareholders are The Dow Chemical Company ("Dow Chemical") and Corning Incorporated.

Litigation Fund assets are not available to fund any deficit created by payment of Second Priority Payments and that it must afford Appellants the meaningful right to be heard required by the Plan and Plan Documents. *See, e.g., Affum v. United States*, 566 F.3d 1150, 1159 (D.C. Cir. 2009) (remanding with instructions to ensure that the district court will "apply the correct legal standards"). Time is of the essence. Pursuant to the lower court's order, the Settlement Facility-Dow Corning Trust ("SF-DCT") – the entity that processes and pays claims – has begun distributing millions of dollars in irrevocable Premium Payments.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334. This Court has jurisdiction to review the district court's December 31, 2013 final order pursuant to 28 U.S.C. § 1291. *See* RE #934. Appellants filed a timely notice of appeal on January 16, 2014. *See* Notice of Appeal, RE #935, Page ID #15780.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court erred by failing to address Appellants' arguments and ordering payment of just one of three categories of Second Priority Payments, thereby demoting the other categories in violation of the Plan and Plan Documents which mandate parity among all categories of Second Priority Payments and in violation of

the Bankruptcy Code which prohibits modification to the confirmed Plan and unequal treatment of equal priority claims.

2. Whether the district court erred by failing to apply the correct legal standard under the Plan and SFA in finding merely "adequate" provision for the payment of First Priority Payments when the Plan and SFA require that such payments, as well as other higher priority payments, must be "assured" for all claimants throughout the program before Second Priority Payments may be distributed.
3. Whether the district court erred by considering the remaining amount of the Litigation Fund as an available asset when evaluating the sufficiency of assets for Second Priority Payments when the Plan and SFA authorize the use of the Litigation Fund assets under certain limited conditions only for First Priority Payments and not for Second Priority Payments.
4. Whether the district court erred by determining that the Finance Committee was entitled to rely on an additional $200 million in assets on the ground that Dow Corning was not entitled to a "time value credit" for early payment of the Initial Payment and other payments made before the Effective Date of the Plan, when the issue of the valuation of the Initial Payment with respect to the funding obligation

was expressly not decided by this Court and is currently the subject of a pending motion that is under advisement by the district court.

5. Whether the district court erred in refusing to consider the exhibits and expert analysis presented by Appellants to demonstrate why the Plan's and SFA's standard for issuing Second Priority Payments was not satisfied, thereby denying Appellants a meaningful opportunity to be heard as required by the Plan.

STATEMENT OF THE CASE AND FACTS

A. Background

This Court has previously discussed the history of Dow Corning's bankruptcy proceedings and Amended Joint Plan of Reorganization. *See, e.g.*, *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769 (6th Cir. 2010); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). The relevant portions of that history are summarized here.

B. Dow Corning's Amended Joint Plan of Reorganization

The Dow Corning bankruptcy was caused by one of the largest and most contentious mass tort controversies of the last two decades. The litigation arose out of allegations that silicone gel breast implants could cause certain autoimmune diseases. By the mid-1990s, Dow Corning and other breast implant manufacturers were faced with tens of thousands of claims filed throughout the United States and

in various other countries. Although scientific studies have demonstrated the lack of a causal connection between the implants and the alleged diseases, Dow Corning was forced to seek protection under Chapter 11 of the Bankruptcy Code due to the massive number of cases filed.[3]

Dow Corning filed its Chapter 11 petition on May 15, 1995. Plan, RE #826-3, Page ID #13331, §1.126. In 1999, Dow Corning and the representatives of the tort claimants – the Tort Claimants' Committee – agreed to the Plan which provided a comprehensive settlement package for claimants. Following appeals, the Plan became effective on June 1, 2004. Order, RE #934, Page ID #15761.

The cornerstone of the Plan is a program for the resolution of breast implant and other medical device tort claims funded by Dow Corning through a series of annual payments (as needed) over a 16-year funding period, up to an aggregate cap of $2.35 billion net present value ("NPV") as of the Plan's June 1, 2004 Effective Date. The Plan offers tort claimants the option of settling their claims through a Settlement Facility or litigating their claims against a Litigation Facility. Plan, RE

[3] The scientific consensus today is that there is "no elevated relative risk or odds ratio for an association of implants with disease." Stuart Bondurant et al., *Safety of Silicone Breast Implants*, National Academy Press, 1999, at 7, *available at* http://www.nap.edu/catalog.php?record_id=9602 (last accessed April 21, 2014); *see id*. at 197; *accord Silicone Gel Breast Implants*, Report of the Independent Review Group, July 1998, at 6, *available at* http://www.mhra.gov.uk/home/groups/dts-bi/documents/websiteresources/con2032510.pdf (last accessed April 21, 2014).

#826-3, Page ID #13346-49, §§5.4-5.4.2. The aggregate funding cap is divided between two funds: the $400 million NPV Litigation Fund is reserved for the Litigation Facility and the remainder, $1.95 billion NPV, is the Settlement Fund funding cap. *Id.* at Page ID #13345, §5.3; SFA, RE #826-2, Page ID #13260-61, §§3.02(a)(i)-(ii).

Claimants are permitted to submit Disease Claims and Expedited Release Claims until June 3, 2019, regardless of when a covered condition becomes manifest. (Claimants may also submit claims for compensation for removal of breast implants until June 2, 2014.) The Plan sets forth settlement values for each type of claim based on the medical condition – and thus provides equal benefits to claimants who develop qualifying medical conditions at any time during the life of the program.

C. The Settlement Program, The SFA And Payment Priority

The SFA governs the liquidation, settlement and payment of claims within the limits of available Settlement Fund assets. SFA, RE #826-2, Page ID #13259, §2.01. Section 7.01 of the SFA establishes the categories of payment, the principles governing distribution of the Settlement Fund and Litigation Fund, and the priority and timing of payment.

There are four categories of payments: First Priority Payments, Settlement Fund Other Payments, Litigation Payments and Second Priority Payments. Two of

these categories are of particular relevance here. The SFA defines First Priority Payments to include all the "base" payments identified in the settlement value chart that specifies the values for each type of settling breast implant claim.[4] Second Priority Payments, on the other hand, include: (1) Premium Payments for certain Settling Claimants; (2) Increased Severity Payments for Settling Breast Implant Claimants whose condition worsens during the program; and (3) Class 16 Payments, which are funds owed to Dow Chemical for settlement amounts paid before the Plan's Effective Date.[5] Plan, RE #826-3, Page ID #13368-69, §§6.16.5, 6.16.6.

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[4] The SFA defines First Priority Payments, *inter alia*,

> as Expedited Release Payments . . . Explantation Payments, Disease Base Payments (for Breast Implant Claims), Rupture Base Payments (for Breast Implant Claims), Medical Condition Payments for Covered Other Products, and Silicone Material Payments, along with related administrative costs . . . .

Id. at Page ID #13280, §7.01(a)(i).

[5] The SFA defines Second Priority Payments, *inter alia*, as those

> identified on the Settlement Grid as "Premium Payments" for Breast Implant Disease Payment Option Claims and Rupture Payment Option Claims and for Covered Other Products Claims and payments for increased severity of disease or disability under the Breast Implant Disease Payment Option (for both Disease Payment Option I and Disease Payment Option II) . . . . Payments made to Class 16 Claimants in respect for the obligations in Section 6.16.5 and 6.16.6 of the Plan that are to be paid by the Settlement Facility shall be defined as Second Priority Payments.

(Footnote continued)

The SFA details predetermined payment amounts based on the type of claim and, for Disease claims, the particular medical condition diagnosed. For example: a claimant in Class 5 (domestic breast implant claimant) would have a First Priority, "base" payment for an Option II Disease claim for Lupus Compensation Level C of $150,000. SFA Annex B, RE #814-3, Page ID #12412. If Second Priority Payments were eligible to be paid, the claimant would be eligible for up to $30,000 as a Premium Payment and up to an additional $120,000 for an Increased Severity Payment if the condition were to become more severe.[6] *Id*.

As their names imply, the SFA expressly mandates that First Priority Payments have a higher priority than Second Priority Payments and that Second Priority Payments are the lowest priority of all types of payments. It also makes clear that First Priority Payments cannot be jeopardized by the distribution of Second Priority Payments. *See*, *e.g.*, SFA, RE #826-2, Page ID #13281, §7.01(c)(i) ("All categories of payment are subject to reduction if necessary to assure payment in full of First Priority Payments (subject to the limits of the Settlement Fund and the Litigation Fund)."). In other words, First Priority

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(Footnote continued from previous page)

Id. at Page ID #13280, §7.01(a)(iii).

[6] If the severity of the Lupus Compensation Level C claimant's condition increased to Lupus Compensation Level A, the base payment would be $250,000 and the Premium Payment $50,000.

Payments are paramount and were intended to be virtually guaranteed while Second Priority Payments were intended to function as additional or supplemental payments or reimbursements, payable only once First Priority Payments and all other higher priority claims were accounted for.

The SFA thus provides that Second Priority Payments may be paid *if and only if* payment in full of all allowed and allowable First Priority Claims, Settlement Fund Other Payments and Litigation Payments is "assured":

> Second Priority Payments may not be distributed ***unless and until*** the District Court determines that all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility Agreement, have either been paid or adequate provision has been made ***to assure*** such payments.

Id. at Page ID #13281, §7.01(c)(iv) (emphasis added); *see also id.* at Page ID #13285, §7.03(a).

When the conditions described above have been satisfied and thus trigger distribution of Second Priority payments, the SFA and the Plan specifically identify the manner in which the funds shall be distributed. First, all three categories of Second Priority Payments (Premium Payments, Class 16 Payments, and Increased Severity Payments) must be paid at the same time and with the same priority. Plan, RE #826-3, Page ID #13368, §§6.16.5, 6.16.6 (Class 16 Payments "shall be reimbursed . . . in full, together with interest . . . from funds maintained by the Settlement Facility . . . ***on the same basis and with the same priority as***

'Second Priority Payments' under the [SFA]") (emphasis added). Second, the Finance Committee[7] must file a motion requesting authorization to distribute Second Priority Payments accompanied by a detailed accounting of the status of claims payments along with an analysis of the cost of resolution of pending (i.e., filed) claims. *See*, *e.g.*, SFA, RE #826-2, Page ID #13285, §7.03(a). The SFA specifies that various parties have a right to be heard with respect to this motion. *Id*. Third, the SFA outlines strict criteria that must be met before Second Priority Payments may be distributed. *Id*. The district court was required to adhere to these terms before approving Second Priority Payments.

D. The SFA And Plan Provisions Require Equitable Treatment Of Claimants

The settlement program is designed to ensure that similarly situated claimants receive the same distribution. That result is accomplished initially through the settlement payment grids. In addition, the Plan and SFA contain numerous provisions that specify mechanisms to maintain parity among claimants. SFA Section 7.02(d)(i) provides for "proportional payments (i.e., installment distributions)" of allowed claims under certain circumstances, subject to court approval, "so that all such Allowed Claims are paid ***in the same proportions***." *Id.*

[7] The Finance Committee is "responsible for financial management for the Settlement Facility" and acts as a fiduciary in maintaining and preserving Trust assets. *Id.* at Page ID #13321, §1.67.

at Page ID #13283, §7.02(d)(i) (emphasis added). Section 7.03(c)(i) allows the Court to authorize proportionally reduced payments if necessary "***to assure equitable distributions*** to Claimants within the aggregate limits of the Settlement Fund, the Litigation Fund or Other Products Fund as applicable." *Id.* at Page ID #13286, §7.03(c)(i) (emphasis added). SFA Section 10.03(b) authorizes, on termination of the Settlement Facility, the distribution of any excess funds "***pro rata*** to the holders of Allowed Claims previously paid to Claimants . . . by the Settlement Facility." *Id.* at Page ID #13289-90, §10.03(b) (emphasis added). Sections 6.16.5 and 6.16.6 of the Plan provide for reimbursement to Dow Chemical of Class 16 settlement payments it made ***"on the same basis and with the same priority"*** as all other Second Priority Payments under the SFA. Plan, RE #826-3, Page ID #13368, §§6.16.5, 6.16.6 (emphasis added).

E. The Finance Committee's Motion

On October 7, 2011, the Finance Committee filed its First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments (the "Motion"),[8] which sought authorization, pursuant to Section 7.03(a) of the SFA, to distribute only one category of Second Priority Payments: Premium Payments. RE #814. It did not seek distribution of the other two categories of

[8] The Motion amended the Finance Committee's earlier Recommendation and Motion. *See* Motion, RE #814, Page ID #12356.

Second Priority Payments – Increased Severity and Class 16[9] – notwithstanding the clear language of Section 7.03(a) of the SFA, which expressly provides only for authorization to distribute all categories of Second Priority Payments and does not contain any language that would permit the distribution of just one category of Second Priority Payments.

Although the Plan expressly provides that Second Priority Payments may be made only if the district court finds that the payment of all allowed and allowable First Priority, Settlement Fund Other Payments and Litigation Payments is "assure[d]," SFA, RE #826-2, Page ID #13285, §7.03(a), the Motion instead proposed a much lower standard, asserting that the court could authorize Premium Payment distributions if it is merely "more likely than not" that all allowable First Priority and Litigation Payments can be made in full. Motion, RE #814, Page ID #12355.

In support of this incorrect standard, the Finance Committee submitted a report provided by the Independent Assessor. The Independent Assessor, who under Section 7.01(d) is charged with evaluating projected funding requirements on a quarterly basis and the adequacy of projected funding requirements under

[9] In the Motion, the Finance Committee noted that it was "not recommending that other Second Priority Payments, such as Class 16 non-personal injury shareholder payments or increased severity payments be made at this time." *Id.* at Page ID #12357.

Sections 7.02 and 7.03, (SFA, RE #826-2, Page ID #13267, §4.05), did not make any determination that his calculations satisfy the SFA's stringent requirement for issuing Second Priority Payments. Rather, the Independent Assessor provided computations of the potential cost of unknown and unfiled future claims based on a series of untested assumptions that did not address the underlying incidence of the qualified medical conditions and admittedly did not account for all the types of payments that could be paid to such claimants. More specifically, the Independent Assessor:

- Did not include the Increased Severity category of Second Priority Payments. Report of Independent Assessor End of Fourth Quarter 2010 Preliminary Report May 20, 2011, RE #814-13, Page ID #12575 (filed under seal).
- Admitted that the calculations are assumption-based and rely on data and claims evaluation policies in existence during a limited period of time. *Id*. at Page ID #12565-66, 12576.
- Acknowledged that if there is any change in claimant behavior or in the standards applied by the SF-DCT in reviewing claims, the calculations would also change. *Id*. at Page ID #12565-66.
- Explained that the calculations are simply an extrapolation of recent "history" of claims activity to the remaining eight years of the

program and demonstrate only that if his untested assumptions prove to be correct, there should be sufficient assets to pay the First Priority Payments. *Id*. at Page ID #12565-66, 12586-12595.

At the time of the Independent Assessor's report, the SF-DCT had paid 26,695 Disease claims, *id.* at Page ID #12608, and there were 69,699 timely Class 5 Claimants who still retained the right to file Disease claims and receive First Priority Payments. Declaration of Paul J. Hinton ("Hinton Declaration"), RE #826-5, n.3 (filed under seal).

In rote fashion, the Independent Assessor's report concludes that if every assumption in the calculations proves to be correct and if claimant behavior does not change in any way over the remaining eight years of the program and if only a small fraction of claimants who are eligible to file claims in fact do file claims, then paying the proposed 50% Premium Payments would leave a "cushion" of $68.3 million, a tiny fraction (3.5%) of the Settlement Fund – before accounting for the Increased Severity category of Second Priority Payments. Motion, RE #814, at Page ID #12358.

Finally, the Finance Committee's Motion – apparently recognizing the uncertainties in the calculations – contended that if future claims did exhaust the cushion, the funds remaining in the Litigation Fund "will be available to pay existing or future" claims. *Id*. at Page ID #12364.

The Claimants' Advisory Committee ("CAC") – an entity established by the Plan Documents to undertake certain specified functions regarding the implementation and management of the settlement program – supported the Finance Committee's recommendation but argued in favor of full distribution (100%) of Premium Payments. CAC Resp., RE #825, Page ID #13205. While the CAC did not address the Increased Severity Payments, it expressed "no objection to the Court authorizing Second Priority Payments due to Dow Chemical on the same percentage basis as are approved for tort claimants, since that is consistent with the parties' agreement." CAC Reply, RE #848, Page ID #14336.

Appellants filed a response to the Finance Committee's Motion asserting that (1) the Finance Committee had not shown that the stringent requirements in the SFA governing the distribution of Second Priority Payments were satisfied; (2) the Finance Committee's proposed disparate treatment of Second Priority Payments was prohibited by the clear and unambiguous terms of the SFA and was a modification to the Plan prohibited by Section 1127(b) of the Bankruptcy Code; and (3) the Finance Committee's interpretation of the requirements for the distribution of Second Priority Payments was incorrect and in any event, the calculations submitted with the Motion did not satisfy even that incorrect standard, let alone the stringent standard actually required by the Plan. *See, e.g.*, Appellants' Resp., RE #826, Page ID #13224-42. In support, Appellants submitted a

declaration from an expert economist who analyzed the Independent Assessor's calculations and concluded that those calculations: (1) did not account for all potential payments and (2) did not contain any probability analysis or analysis of risks that would be necessary for the district court to determine whether distribution of Second Priority Payments could meet either the standard in the Plan or even the lesser standard proposed by the Finance Committee. The expert declaration concluded that for these and other reasons the calculations could not support either standard. Hinton Declaration, RE #826-5 (filed under seal). Appellants also identified experiences in other contexts that demonstrated the inherent uncertainty in claim filing behavior and indicated that First Priority Payments could not be assured if the proposed Premium Payments were distributed. In further support, Appellants submitted declarations from two other experts highlighting the imprudence of the proposed distributions. Declaration of William Barbagallo, RE #826-6; Declaration of Georgene M. Vairo, RE #826-7 – 826-19. Appellants also argued that under the Plan, the Litigation Fund could not be considered in assessing the sufficiency of funds to make Second Priority Payments. Appellants' Resp., RE #826, Page ID #13230-31.[10]

[10] In the midst of briefing, the district court decided another motion, holding that Dow Corning was not entitled to many of the Time Value Credits that it had sought for accelerated funding made to the SF-DCT, including one for the $985 million *(Footnote continued)*

F. The District Court's Decision

On December 31, 2013 the district court issued its decision authorizing the Finance Committee's proposed distribution. Order, RE #934. The court concluded that the Plan did not require "assurance" that the higher priority payments be made in full and instead interpreted the Plan to permit the distribution of Second Priority Payments if there is "adequate assurance" that the higher

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Initial Payment it made years before the Plan's Effective Date. *See* 11/28/11 Order, RE #836. The Finance Committee and CAC both argued that the Time Value Credit decision added at least $200 million to the so called "cushion" that resulted from the Independent Assessor's assumption-based calculation. Finance Committee Reply, RE #844, Page ID #14239-40; CAC Reply, RE #848, Page ID #14318-19. Dow Corning appealed the Time Value Credit decision to this Court. This Court found that Time Value Credit is a concept that applies to determine and adjust the annual payment ceilings in the Funding Payment Agreement that governs Dow Corning's funding obligations in the Plan. This Court further found that the Time Value Credit provisions do not affect the calculation of the overall net present value funding cap and expressly declined to rule on the issue of how the early payment of the Initial Payment is to be valued for purposes of determining the net present value funding cap. This Court concluded that "the issue of a net present value adjustment for the Initial Payment ***was not resolved***" by the district court and for that reason, declined to address the issue. *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368, 379 (6th Cir. 2013) (emphasis added). In other words, this Court did not determine whether Dow Corning was entitled to a $200 million credit in valuing the funding stream but instead remanded the issue to the district court on April 18, 2013. On August 5, 2013, the CAC filed a Motion for Order Resolving Dispute Regarding Treatment of Initial Payment. RE #917. Appellants filed a response in opposition to that Motion and the CAC filed a reply. *See* RE #922-923. Oral argument was held on October 24, 2013. The district court has the matter under advisement and has not yet issued a decision.

priority payments can be paid in full. *Id.* at Page ID #15773, 15776-78. Ultimately, the court authorized:

> Fifty-percent (50%) Premium Payments as soon as practicable to Historical Claimants, those whose claims were paid before January 1, 2011, and fifty-percent (50%) Premium Payments to Claimants whose claims have been or will be paid on and after January 1, 2011.

Id. at Page ID #15779.

In so finding, the court considered the Litigation Fund as an available asset to pay First Priority Payments if made necessary by the distribution of Premium Payments. *Id.* at Page ID #15774-75. The court also stated that the amount expected to remain after payment of all projected First Priority Claims is actually $200 million higher than originally considered by the Independent Assessor, ostensibly due to this Court's decision in the Time Value Credit matter and that this additional amount may be considered in evaluating the assets available for First Priority Payments. *Id.* at Page ID #15777. Finally, the court stated it did "not consider" Appellants' expert declarations and exhibits because the SFA does not explicitly "require[]" analysis by any entity other than the Independent Assessor. *Id.* at Page ID #15775-76. The court did not address the issue of parity among categories of Second Priority Payments.

Following the district court's ruling, Appellants filed a timely notice of appeal with this Court, and simultaneously filed a motion to stay, which the Finance Committee did not oppose, but the district court denied and this Court

later affirmed. *See* Notice of Appeal, RE #935; Motion to Stay, RE #936; Order Denying Motion To Stay Pending Appeal, RE #954.

SUMMARY OF ARGUMENT

The district court erred in ordering the distribution of partial Premium Payments totaling more than $100 million to thousands of individual claimants. Pursuant to the Order, the SF-DCT has begun distributing millions of dollars in irrevocable payments. The district court's determination was premised on multiple legal errors.

First, the district court erred by ordering payment of just one of three categories of Second Priority Payments, thereby demoting the other categories in contravention of the Plan and Plan Documents that mandate parity among all categories of Second Priority Payments. The district court's failure to account for other categories of Second Priority Payments – including Increased Severity Payments for Disease claimants and Class 16 Payments – resulted in an unlawful modification to the confirmed Plan and unequal treatment of equal priority claims in violation of the Plan and the Bankruptcy Code and requires reversal as a matter of law.

Second, the district court's determination was based on a fundamental misinterpretation of the SFA's plain language regarding the proper legal standard to be applied in evaluating whether Second Priority Payments may be distributed.

The Plan provides that Second Priority Payments may be paid if and only if certain strict conditions are met. These conditions were established to preserve the priority of distributions and to protect the First Priority Payments. The district court failed to apply the standard, which requires that First Priority Payments must be "assured" before distributing Second Priority Payments, and instead concluded that it need only find "adequate" assurance for their payment.

Third, the district court's determination was based on the erroneous interpretation of the Plan language regarding the availability and use of Litigation Fund assets to finance Premium Payments. The Litigation Fund is expressly "reserved" for the payment of Non-Settling Personal Injury and other specified claims that do not include Settling Claims. SFA, RE #826-2, Page ID #13260-61, §3.02(a)(i). The Settlement Fund is expressly reserved for the payment of Settling Claims and other specified claims, including Class 16 claims. *Id.* at Page ID #13261, §3.02(a)(ii). Thus, all Second Priority Payments may be paid only from the Settlement Fund. In one limited circumstance (assuming certain specified procedural and substantive conditions are met – including a determination that absent access to the Litigation Fund, First Priority Payments could not be paid), SFA Section 7.03(b) permits the use of the Litigation Fund assets to pay only ***First Priority Payments***. The Plan does not permit the use of the Litigation Fund to pay Second Priority Payments. The Litigation Fund, therefore, is not an "available"

asset to pay First Priority Payments when the Settlement Fund has been depleted by improperly authorized Second Priority Payments. The district court's contrary interpretation nullifies the Plan's limitations on the use of the Litigation Fund, in contravention of New York's rules of contract construction.

Fourth, the district court misinterpreted this Court's prior ruling by assuming that because Dow Corning is not entitled to a "time value credit" for early payment of the Initial Payment and other payments made before the Effective Date of the Plan, there is an additional $200 million available for distribution and that this amount is an "available" asset for purposes of evaluating whether there are sufficient funds to distribute Second Priority Payments. While this Court did determine that Dow Corning could not use the time value credit language in the Funding Payment Agreement to adjust annual payment ceilings to account for the fact that it paid certain significant amounts early – before the Effective Date of the Plan – this Court expressly declined to rule on how these early payments are to be valued for purposes of determining the net present value of the funding stream. This precise issue (i.e., the valuation of the early payments with respect to the funding stream) is the subject of a separate motion filed in the district court by the CAC. That motion has been briefed and argued and remains pending before the district court.

Fifth, the district court erred in refusing to consider the exhibits and expert analysis presented by Appellants to demonstrate why the Plan's standard for issuing Second Priority Payments was not satisfied, thereby denying Appellants a meaningful opportunity to be heard as required by the Plan. The district court's determination that there is "adequate" provision for First Priority Payments is based on a forecast of future claims (i.e., claims that are projected to be filed during the final half of the program) that simply assumes a series of untested assumptions will prove to be correct. By refusing to consider the Appellants' expert analysis that demonstrated the uncertainty and limitations of this assumption-based forecast of future claims, the district court rendered meaningless the Appellants' right to be heard under the Plan and Plan Documents.

STANDARD OF REVIEW

This Court set forth the standard of review that applies on appeal when reviewing the district court's interpretation of Plan Documents in two recent appeals in the Dow Corning bankruptcy case. *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368, 372 (6th Cir. 2013) (involving the application of Time Value Credits to account for early payments under the Plan language); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769, 771-72 (6th Cir. 2010) (involving the Plan's definition of tissue

expanders and total disability). In both cases, this Court explained that where its interpretation of a plan provision is confined to the Plan Documents (without reference to extrinsic evidence), its review is *de novo*. *In re Settlement Facility Dow Corning Trust*, 517 F. App'x at 372; *In re Settlement Facility Dow Corning Trust*, 628 F.3d at 772. The issues here involve proper interpretation of unambiguous language in the Plan Documents and thus, as this Court has frequently articulated, there is no deference owed.[11]

The SFA's statement that an "abuse of discretion" standard of review will apply to any appeal of an order regarding Section 7.03(a) does not change that conclusion. SFA, RE #826-2, Page ID #13285, §7.03(a).

> A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard. This court reviews the district court's findings of fact under the clearly erroneous standard: legal conclusions are given de novo review. A factual or legal error may alone be sufficient to establish that the court abused its discretion in making its final determination.

[11] In its denial of Appellants' stay motion, this Court characterized its review of the district court's interpretation of the Plan as deferential; however, that sweeping characterization did not distinguish, as this Court repeatedly has in past decisions, between interpretations of unambiguous contract language, which are reviewed *de novo*, and ambiguous language, which are reviewed deferentially. *In re Settlement Facility Dow Corning Trust*, 517 F. App'x at 372; *In re Settlement Facility Dow Corning Trust*, 628 F.3d at 772.

Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1378 (6th Cir. 1995) (citations and quotations omitted). Because each of Appellants' claims are predicated upon the district court's erroneous legal conclusions, this Court's review under the SFA is *de novo*.

ARGUMENT

A. The District Court Erred By Authorizing Payment To Only One Of Three Categories Of Second Priority Payments In Violation Of The Plan Requirements For Parity Among Equal Priority Claims And The Bankruptcy Code's Prohibition Of Confirmed Plan Modification.

In interpreting a confirmed plan, courts apply basic contract principles. *In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). State law governs those interpretations, and a plan must be enforced as written. *Id.* The relevant documents are governed by New York law. Plan, RE #826-3, Page ID #13366, §6.13; SFA, RE #826-2, Page ID #13291, §10.07.

Under well-established New York contract law, the agreement's plain language controls in ascertaining the parties' intent. *Crane Co. v. Coltec Indus., Inc.*, 171 F.3d 733, 737 (2d Cir. 1999); *Cerand v. Burstein*, 72 A.D.3d 1262, 1265 (N.Y. App. Div. 3d Dep't 2010). Words and phrases are given their "plain, ordinary, popular and non-technical meanings." *Tigue v. Commercial Life Ins. Co.*, 631 N.Y.S.2d 974, 974 (N.Y. App. Div. 4th Dep't 1995); *see LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.* 424 F.3d 195, 206 (2d Cir. 2005).

The SFA defines three categories of Second Priority Payments – Premium Payments, Increased Severity Payments, and Class 16 Payments – and makes no distinction among them. SFA, RE #826-2, Page ID #13280, §7.01(a)(iii). Thus, all three categories of Second Priority Payments have the same priority and must be distributed – if the required conditions for distribution are met – ***at the same time and on the same basis***. Yet, the Finance Committee's Motion requested authorization to distribute *only* Premium Payments. Motion, RE #814, Page ID #12361. It excludes from the relief sought the two other categories of Second Priority Payments – Class 16 and Increased Severity Payments.[12] Motion, RE

[12] The Finance Committee did not consider the Increased Severity category of payments at all in its Motion or in the calculations it relied on in support of the Motion. In its reply filed in the district court, the Finance Committee stated that it had "no objection to the Court's authorization of 50 percent Increased Severity Payments should the Court opt to modify the Recommendation as such." Finance Committee Reply, RE #844, Page ID #14237. However, a statement of "no objection" does not and cannot satisfy the Finance Committee's and the district court's obligations under the Plan. If the Finance Committee wants to recommend payment of all categories of Second Priority Payments, it must file a recommendation to distribute such payments and that recommendation must be accompanied by the prescribed information. SFA, RE #826-2, Page ID #13285, §7.03(a). The district court must then afford the parties the opportunity to be heard and must ultimately review the evidence and make a determination as to whether the higher priority payments are assured. *Id.* And even the Finance Committee's statement of "no objection" is inconsistent with other statements made by the Finance Committee. The Finance Committee first stated in its Reply that it "may be premature to make such payments . . . . because of some uncertainties as to the amount of those payments." Finance Committee Reply, RE #844, Page ID #14230. The Finance Committee then suggested that the parties could "agree" on *(Footnote continued)*

#814, Page ID #12361; Finance Committee Reply, RE #844, Page ID #14237 (n.1). Though the district court did not expressly address this issue, by granting the Finance Committee's Motion and authorizing payment of only Premium Payments and not the other categories of Second Priority Payments, the court provided for disparate treatment of Second Priority claimants in violation of the Plan and Bankruptcy Code requirements for parity of treatment. The Order is unlawful on its face.

If claimants who qualified for Increased Severity or Class 16 Payments were intended to be treated less favorably than those entitled to Premium Payments, the SFA would have provided for Third and/or Fourth Priority Payments. It did not do so, and there is no language in any Plan Document that permits this disparate treatment. To the contrary, the Plan repeatedly and clearly notes the intent to distribute funds equitably and that all categories of Second Priority Payments are to be paid on the same basis. *See, e.g.*, Plan, RE #826-3, Page ID #13368, §§6.16.5, 6.16.6 (Class 16 claims be paid "***on the same basis and with the same priority*** as 'Second Priority Payments.'") (emphasis added). The district court's

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the value of these Increased Severity Claims – thereby abandoning its own obligations to submit a fully supported recommendation to the district court. *Id.* at Page ID #14237. Moreover, the Finance Committee never renounced its exclusion of the Class 16 Payments from its Motion.

disregard of the Plan and SFA's plain language contravenes basic canons of contract interpretation. *Tigue*, 631 N.Y.S.2d at 974 (courts must "ascertain the intent of the parties from the plain meaning of the language employed, giving terms their plain, ordinary, popular and non-technical meanings").

The district court's demotion of Increased Severity Payments and Class 16 Payments to a lower priority than Premium Payments also constitutes an improper Plan modification in violation of both the Bankruptcy Code and the Plan. Section 1127(b) of the Bankruptcy Code prohibits modifications to a plan that has been substantially consummated due to the need for finality – so that all parties may rely on the rights accorded them in a plan. *See, e.g., Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633, slip op. at 4 (6th Cir. Aug. 6, 2009) ("the district court had no authority to modify the Plan, equitable or otherwise"); *In re Antiquities of Nev., Inc.*, 173 B.R. 926, 928 (B.A.P. 9th Cir. 1994); *In re Egger*, No. 09-12432, 2012 U.S. Dist. LEXIS 140399, at *4 (E.D. Mich. Sept. 28, 2012) ("Section 1127(b) is the sole means for modification of a confirmed plan."); *In re Boylan Int'l, Ltd.*, 452 B.R. 43, 47 (Bankr. S.D.N.Y. 2011); *In re Settlement Facility Dow Corning Trust (Bennett)*, No. 08-12019, 2009 WL 4506433, at *1 (E.D. Mich. Nov. 25, 2009). Modifications that would materially affect

substantive rights granted to a creditor are prohibited.[13] The district court's Order violates these principles by effectively rewriting the Plan to prioritize Premium Payments over other Second Priority Payments. By "improperly appl[ying]" the Bankruptcy Code, the district court committed a legal error "sufficient to establish that the court abused its discretion." *Performance Unlimited, Inc.*, 52 F.3d at 1378.

Such a modification also violates the Plan itself. Section 11.4 of the Plan prohibits any post-confirmation Plan amendment unless in accordance with Section 1127(b) and mutually agreed upon by the Plan Proponents. Plan, RE #826-4, Page ID #13392, §11.4. Section 10.06 of the SFA prohibits any modification of its terms that "would . . . increase . . . the amount or value of any payment . . . to . . . a Claimant," without Dow Corning and the CAC's prior written consent. SFA, RE #826-2, Page ID #13290, §10.06. Without Dow Corning's consent (which has not been given), the proposed modification is barred by the Plan and the SFA.

The CAC concedes that the Finance Committee's Motion contravenes the SFA and the Plan. Indeed, before the district court, the CAC stated that, as to

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[13] *See also In re Planet Hollywood Int'l*, 274 B.R. 391, 399-400 (Bankr. D. Del. 2001) (denying motion for premature distribution that would favor one creditor over similarly situated creditors); *In re Rickel & Assocs., Inc.*, 260 B.R. 673, 677-79 (Bankr. S.D.N.Y. 2001) (rejecting effort to modify plan to permit distribution of unanticipated surplus to shareholders who otherwise would receive nothing); *In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 815-17 (S.D.N.Y. 1997) (rejecting plan modification that would restore debtor's right to first refusal expressly extinguished by confirmed plan).

Class 16 Dow Chemical claims, it "has no objection to the Court authorizing Second Priority Payments due to Dow Chemical on the same percentage basis as are approved for tort claimants, since that is ***consistent with the parties' agreement***." CAC Reply, RE #848, Page ID #14336 (emphasis added).[14] The Independent Assessor also recognized that "Class 16 claims are to be made with the same priority as 'Second Priority Payments'". Report of Independent Assessor End of Fourth Quarter 2010 Preliminary Report May 20, 2011, RE #814-13, Page ID #12574 (filed under seal). But both the Finance Committee and the district court failed to recognize that Premium Payments cannot be distributed without also distributing Class 16 Payments.

B. The District Court Erred As A Matter Of Law By Finding Merely "Adequate" Provision For The Payment Of First Priority Payments When The Plan Requires That Such Payments Must Be "Assured" For All Claimants Throughout The Program Before Second Priority Payments May Be Distributed.

The district court's ruling is premised on another fundamental legal error – a misinterpretation of the SFA's plain language governing the distribution of Second Priority Payments. Sections 7.01(c)(iv) and 7.03(a) of the SFA set forth the

[14] The CAC reiterated this position in its Response of Claimants' Advisory Committee In Opposition To Motion To Stay The District Court's Ruling Regarding Partial Premium Payment Distribution By The Finance Committee Pending Appeal, filed in this Court on March 10, 2014. Document #006111986841 at 9.

standard governing the distribution of Second Priority Payments. Such payments may not be made "***unless and until***" the district court determines that payment of "all other Allowed and allowable First Priority Claims" and Litigation Payments is "***assure[d].***" SFA, RE #826-2, Page ID #13281, 13285, §§7.01(c)(iv), 7.03(a) (emphasis added). Under governing New York law, "assured" must be interpreted to mean "virtually guaranteed." *Utilities Eng'g Inst. v. Kofod*, 58 N.Y.S.2d 743, 744-45 (N.Y. Mun. Ct. 1945) (defendant who "assure[d] payment" guaranteed payment); *Nat'l Watch Co. v. Weiss*, 163 N.Y.S. 46 (N.Y. Sup. Ct.), *aff'd*, 166 N.Y.S. 1104 (N.Y. App. Div. 4th Dep't 1917) ("assurance" of payment is a guarantee of payment); *United States v. Jacobs*, 304 F. Supp. 613, 618 (S.D.N.Y. 1969) ("The phrase, 'securing the payment,' usually is taken to mean to assure, guarantee, or make certain, payment of a debt or obligation.").

The structure of the sentence in Section 7.01(c)(iv) itself mandates this conclusion: it says that the higher priority claims must have either been paid – in which case there can be no question about the amount of funds that remain – or that "adequate provision has been made to assure such payment…" which indicates that the claims are known and the amount required to pay them has been determined with virtual certainty. *See Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998) (in construing agreements, "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole"). This clear,

affirmative and stringent standard is necessary in light of the Plan's mandate to preserve the priority of distributions, to protect the First Priority Payments and to avoid unnecessary and undue risk and potentially unequal treatment to those claimants who may file their claims in the later years of the settlement program.

The district court ignored the plain language of Sections 7.01(c)(iv) and 7.03(a) of the SFA which governs the distribution of Second Priority Payments and instead adopted a different standard that it borrowed from a section of the SFA that does not pertain to the conditions for issuing Second Priority Payments. In so doing, the district court nullified the standard and ceded its authority to the Finance Committee. The district court found that:

> The purpose of the Premium Payment provision is to give the Finance Committee the discretion to seek court approval to pay Premium Payments *contemporaneously* with the First Priority Payments if the Finance Committee is "reasonably assured" that there are sufficient funds to distribute both payments. This Court is then to determine whether there is "adequate provision" to "assure" such payments.

Order, RE #934, at Page ID #15772 (emphasis in original).

There is no "Premium Payment provision" in the SFA or the Plan. From the text of the Order, it appears that the district court is referring to a provision in the SFA (Section 7.01(c)(v)) that governs the contemporaneous distribution of Second Priority Payments and higher priority payments *if* Second Priority Payments have

been properly authorized.[15] This provision is necessary because funding payments are capped on an annual basis[16] and if Second Priority Payments are properly authorized while First Priority Payments are being distributed, then the First Priority Payments still have priority in terms of timing of payment. That is, Section 7.01(c)(v) instructs the Finance Committee that it cannot pay higher and authorized lower priority payments contemporaneously at any point in time unless there is "reasonable assurance" that the higher priority payments will be paid "*timely*." If paying the lower priority payments would result in a delay in the payment of the higher priority payments, then the lower priority payments would have to be deferred.[17] This provision has nothing to do with the threshold standard

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[15] Section 7.01(c)(v) of the SFA permits contemporaneous payment of lower and higher priority payments "so long as the ability to make ***timely*** payments of higher priority claims is ***reasonably assured***." SFA, RE #826-2, Page ID #13281, §7.01(c)(v) (emphasis added). One cannot address the timeliness of payments unless it has already been determined that they are authorized for distribution.

[16] The Funding Payment Agreement is the Plan Document that governs Dow Corning's obligations to make payments to fund the payment of tort claims under the program. That Agreement sets forth a funding schedule, with an up-front "Initial Payment" and subsequent payments to be made if and as needed subject to annual caps on the funding obligation. Funding Payment Agreement, RE #814-4, Page ID #12421, 12423, §§2.01(a), 2.01(b).

[17] To illustrate: The payment of Second Priority Payments will, by definition, increase the amounts paid in any annual funding period and thus these additional payments could affect the cash flow since funding is capped on an annual basis. If Second Priority Payments, when added to First Priority Payments, would result in an aggregate amount that exceeds the funding cap in that year, then Section

(Footnote continued)

governing the authorization to pay Second Priority Payments – which is plainly and affirmatively set forth in Sections 7.01(c)(iv) and 7.03.

Indeed, the "reasonable assurance" language of Section 7.01(c)(v) shows not only that the parties knew how to deliberately lessen the degree of assurance required to take action under the SFA, but that they also purposely tailored different standards to meet different levels of risk.[18] "Under accepted canons of contract construction, when certain language is omitted from a provision but placed in other provisions, it must be assumed that the omission was intentional." *Sterling Investor Servs., Inc. v. 1155 Nobo Assocs., LLC*, 818 N.Y.S.2d 513, 516 (N.Y. App. Div. 2d Dep't 2006). Moreover, a court "'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.'" *NFL Enters. LLC v.*

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7.01(c)(v) directs the Finance Committee to avoid distributing Second Priority Payments – even if they are properly authorized under Sections 7.01(c)(iv) and 7.03(a) – if the distribution at that time could delay payment of any First Priority Payments until a later funding period.

[18] It also is noteworthy that the Plan drafters used the word "assure" in another provision of the SFA in a manner consistent with the interpretation of assure to mean "virtually guaranteed." A fundamental purpose of the Settlement Facility is "to assure that the Trust qualifies as a Qualified Settlement Fund pursuant to § 468B of the Internal Revenue Code and the Treasury Regulations promulgated thereunder." SFA, RE #826-2, Page ID #13259, §2.01. The parties could not have reasonably intended the same word to be construed differently in Sections 7.01(c)(iv) and 7.03(a).

Comcast Cable Commc'ns, LLC, 851 N.Y.S.2d 551, 555-56 (N.Y. App. Div. 1st Dep't 2008).

After concluding that the unrelated timing provision of Section 7.01(c)(v) governs the Finance Committee's determination with respect to the authorization to distribute Second Priority Payments, the district court compounded the error by concluding that it need only find "adequate assurance" that the higher priority payments can be made even if Second Priority Payments are distributed mid-way through the settlement program. It did so by concluding that the word "adequate" and the term "adequate provision" are the same, that the word "to" that appears before "assure" should be ignored and therefore the word "adequate" modifies "assure." The district court found that this construction reflected the parties' intent because, in its view, the more stringent "assure" standard is contrary to the "purpose" of the so-called Premium Payment provision. Order, RE #934, Page ID #15771-73.

The court's reasoning turns logic on its head. The "purpose" of the Second Priority Payments is to provide additional payments to specified claimants if there are sufficient funds available without jeopardizing higher priority payments. The purpose of the strict standard governing the distribution of Second Priority Payments in Sections 7.01 and 7.03 is to ensure that First Priority Payments remain paramount and that they are assured before the limited funds are used for lower

priority payments. It makes no sense to say that the purpose of the "Premium Payment provision" is to allow the application of a lesser standard when determining whether Second Priority Payments may be paid.

Thus, the district court's reading violates accepted canons of contract construction and rewrites the governing language in two ways. First, it nullifies the governing provisions of Sections 7.01(c)(iv) and 7.03(a) by substituting the language of a different provision (Section 7.01(c)(v)) on the theory that Section 7.01(c)(v) governs the Finance Committee's recommendation. Second, it concludes that the words "provision to" have no meaning and that as a result, the word "adequate" modifies (and weakens) the stand-alone word "assure." This construction improperly reformats the order and significance of the sentence and fails to consider the words in the context of "the obligation as a whole." *See Kass*, 91 N.Y.2d at 566.

The SFA requires that there must be "adequate provision . . . to assure" payment of all allowed and allowable First Priority Payments. SFA, RE #826-2, Page ID #13285, §7.03(a). "Assure" is not ambiguous or qualified. For more than 140 years, New York courts – including New York's highest court on at least two

occasions – have consistently equated "assure" with certainty or a warranty.[19] *See also In re Holly's, Inc.*, 140 B.R. 643, 702 n.98 (Bankr. W.D. Mich. 1992) ("'***[a]ssured'*** is defined as 'characterized by certainty or security. . . beyond doubt or question: unquestionable, certain'") (emphasis added).[20] These holdings are consistent with the common dictionary definition of the word "assure."[21] *See Nat'l*

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[19] *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 503 (1990) ("warranty [i]s 'an assurance by one party to a contract of the existence of a fact upon which the other party may rely'") (citation omitted); *Davenport v. Ruckman*, 37 N.Y. 568, 574 (1868) ("That which is assured, is made certain, secure, or fixed"); *see In re Picard's Estate*, 125 N.Y.S.2d 84, 85 (N.Y. Surr. Ct. 1953) (authorizing invasion of trust principal to the extent income was insufficient to pay $1,600 per annum to testator's widow where testator authorized creation of trust in the principal amount of $50,000 "to 'assure', that is, to make certain, the payment of the aforesaid sum" to his widow).

[20] In *Holly's*, the court summarized the standards courts have applied in determining whether a debtor had met its burden of opposing a request for relief from the automatic stay under 11 U.S.C. § 362(d)(2)(B):

> (1) is it *plausible* that a successful reorganization will occur within a reasonable time?; (2) is it *probable* that a successful reorganization will occur within a reasonable time?; (3) is it *assured* that a successful reorganization will soon occur?; or (4) is it *impossible* that a successful reorganization will occur within a reasonable time?

140 B.R. at 700 (emphasis added). The court noted that "'[a]ssured' is the most stringent standard," *id.* at 700 n.91), and that it is "defined as 'characterized by certainty or security. . . beyond doubt or question: unquestionable, certain,'" *id.* at 702 n.98 (citation omitted).

[21] This strict standard also ensures that the Plan complies with the principles of fairness and equal treatment embodied in Bankruptcy Code Section 1123(a)(4), which mandates "the same treatment for each claim … of a particular [plan] class." *See, e.g.*, 7 COLLIER ON BANKRUPTCY ¶¶ 1122.03, 1129.03[3][c][iii] (16th

(Footnote continued)

Watch, 163 N.Y.S. at 47 (relying upon dictionary definition of "assurance as synonymous with pledge, guaranty or surety").[22]

The SFA's plain language, the parties' intent and New York cases construing the term "assure" thus required the district court to find that payment in full of all allowable First Priority Claims and Litigation Payments was "assured," *i.e.*,

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Ed. 2014). A "cardinal principle underlying bankruptcy law," codified in Section 1123(a)(4), "is equality of treatment of similarly situated creditors." *Id.* ¶ 1122.03 Disparate treatment based solely on the happenstance of when a disease manifests or a breast implant claimant submits a claim and is paid would violate this fundamental Code precept. *See In re Johns-Manville Corp.*, 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986) (distinction between present and future victims is "nominal"). The SF-DCT has already begun distributing Premium Payments to certain breast implant claimants in Plan Classes 5, 6.1 and 6.2. If it is later determined that there are insufficient funds to make First Priority Payments or Premium Payments (from the capped Settlement Fund) to other breast implant claimants in these same Classes who have not yet filed their claims – the precise result that the strict "assured" standard in SFA Sections 7.01(c)(iv) and 7.03(a) was designed to avoid will obtain. That is, claimants in the same Plan Class will receive unequal treatment – a result that would run afoul of the Bankruptcy Code.

[22] *See* Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "assure" as "to make safe (as from risks. . .)"; "to make sure or certain"; "to make certain the coming or attainment of"; "guarantee," and defining "assurance" as "pledge" or "guarantee"). New York courts look to dictionary definitions to determine the ordinary meaning of words in a contract. *See, e.g., R/S Assocs. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 33 (2002).

virtually guaranteed, before it authorized distribution of Second Priority Payments.[23] The district court's Order fails to do so.

C. The District Court Erred As A Matter Of Law By Considering The Remaining Amount Of The Litigation Fund As An Available Asset When Evaluating The Sufficiency Of Assets For Second Priority Payments Because The Plan Prohibits The Use Of The Litigation Fund For The Purpose Of Financing Premium Payments.

The district court improperly considered the Litigation Fund assets as "available" in the Premium Payments determination. Order, RE #934, Page ID #15774-75 ("The Finance Committee properly included the Litigation Fund assets in its recommendation to distribute Premium Payments to the Court."). Under SFA Section 7.03(a), funding sufficiency must be determined "based on the available assets." SFA, RE #826-2, Page ID #13285, §7.03(a). The Litigation Fund is not an "available asset" for purposes of determining the sufficiency of funds to pay all First Priority Payments in full.

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[23] The district court cited one case in its opinion that construed the term "adequate provision" in the context of a sales contract provision to release certain properties from a second mortgage lien. *Broadstone Realty Corp. v. Evans*, 251 F. Supp. 58 (S.D.N.Y. 1966) (J. Frankel). However, the *Evans* court's unremarkable recognition that "the notion of 'adequate' is a variable one" provides no basis for the district court here to misconstrue the language of SFA Sections 7.01(c)(iv) and 7.03(a) as it did. Order, RE #934, Page ID #15772 (*citing Evans*, 251 F.Supp. at 64). Indeed, the *Evans* case bears no relevance to this case because it did not address the construction of the unmodified term "assure" under New York law (a term that did not appear in the contract provision at issue in *Evans*).

The SFA specifies the only categories of claims that may be paid from the Litigation Fund. Under the SFA, the Litigation Fund is "reserved" for the payment of Non-Settling Personal Injury and other claims. *Id*. at Page ID #13260-61, §3.02(a)(i). Second Priority Payments are not included in the categories of claims that may be paid from the Litigation Fund. *Id.* at Page ID #13280-81, §7.01(a), (b)(ii) ("The Litigation Fund shall be used ***solely*** for the payment of Litigation Payments" and, under certain conditions, First Priority Payments) (emphasis added). The Litigation Fund is not "available" to pay the claims of ***any*** Settling Personal Injury claimants except under one limited circumstance: if, in accordance with specified procedures, the district court determines that the Settlement Fund "lacks sufficient funds in the aggregate to pay in full all ***First Priority Payments***" then the district court may permit access to the Litigation Fund for the purpose of paying *only* **First Priority Payments**. *Id.* at Page ID #13285, §7.03(b); *see id.* at Page ID #13281, §7.01(b)(ii) (emphasis added). Because the Plan does not authorize the use of the Litigation Fund for Second Priority Payments under any circumstances, the Litigation Fund plainly is not an "available asset" in determining whether the payment of all First Priority Payments in full is "assure[d]" under Sections 7.01(c)(iv) and 7.03(a) of the SFA. *Id.* at Page ID #13285, §7.03(b).

Allowing the Litigation Fund to be used as a general source of backup funds if Second Priority Payments deplete the Settlement Fund violates the structure, language and purpose of the SFA and nullifies the standards and procedures under Sections 7.01(a), (b)(ii) and related provisions, in contravention of settled rules of contract construction.[24]

Nearly 70,000 claimants retain the right to file Disease claims until June 3, 2019. The number of potential claimants who have the right to file Disease claims (and had not yet done so at the time of the Finance Committee's Motion) is nearly three times the number of claimants who had already been paid their First Priority Payments and who will receive over $100 million in Premium Payments if the Order is affirmed. The $68 million net present value cushion that the district court relied on is projected to be sufficient to pay only 6,550 Disease claimants. Order, RE #934, Page ID #15778. If the Settlement Fund is depleted by the improper

[24] In essence the district court reasoned that if the Finance Committee is wrong, then the error would create a situation that would justify invading the Litigation Fund to "correct" the error. This is precisely why the requirement for authorizing the distribution of Second Priority Payments is specific and stringent. The law typically does not reward parties who create their own exigencies or cause the conditions from which they seek relief. *See, e.g.*, *In re Gorilla Cos. LLC*, 429 B.R. 308, 316, n.24 (Bankr. D. Ariz. 2010) (rejecting creditor's objection to bankruptcy court jurisdiction over his claims where the creditor had engaged in aggressive self-help remedies that forced debtor to declare bankruptcy); *see also Kubarych v. Siegel*, 595 N.Y.S.2d 293 (N.Y. Sup. Ct. 1993) (denying a party's attempt to vacate an arbitrator's award based on the arbitrator's misconduct, after the party secretly gave the arbitrator NBA basketball tickets during the arbitration hearings).

distribution of Premium Payments, the Settlement Fund may be unable to pay all First Priority Payments in full. The district court's analysis would arguably address such a shortfall by requiring Dow Corning to pay additional amounts from the Litigation Fund assets – in violation of the express terms of the Plan. Thus, the district court impermissibly sanctioned the use of the Litigation Fund for a purpose that the Plan directly forbids.

The district court's reasoning (and the Finance Committee's position) thwarts the plain provisions and requirements of the SFA that establish the priorities and limitations on distributions. If the "assure[d]" standard governing the distribution of Second Priority Payments is properly applied, then there will never be a need to utilize the Litigation Fund to pay settling claims unless the First Priority Payments *alone* (i.e., before distribution of *any* Premium Payments) would exceed the assets of the Settlement Fund.

D. The District Court Erred As A Matter Of Law By Concluding That There Is An Additional $200 Million "Cushion" Because Dow Corning Was Not Entitled To A "Time Value Credit" For Early Payment Of The Initial Payment And Other Payments Made Before The Effective Date Of The Plan.

The district court also improperly concluded that it could count as an additional source of funds $200 million that Dow Corning had claimed as an adjustment to its funding obligations because Dow Corning paid over $1 billion to the SF-DCT before the Effective Date. *Id.* at Page ID #15774-75 ("$200 million

[time value credit claim] may be included in the analysis of whether there are sufficient funds to distribute both First and Second Priority Claims"). The district court's determination was based on an incorrect statement about the holding in a prior appeal.

In the prior appeal, this Court concluded that Dow Corning is not entitled to adjust the annual payment ceilings that define Dow Corning's funding obligations under the Plan based on a "Time Value Credit." That is, this Court determined that the "Time Value Credit" adjustments to the annual payment ceilings apply only in certain circumstances that are spelled out in detail in the governing Plan Document. But, this Court further concluded that the Time Value Credit provisions apply only to the annual payment ceilings and not to the valuation of the entire funding stream. This Court ***expressly*** found that "the issue of a net present value adjustment for the Initial Payment ***was not resolved***" by the district court. *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368, 379 (6th Cir. 2013) (emphasis added). For that reason, this Court specifically declined to address the issue "for the first time on appeal" and determined that the issue should be resolved by the district court in the first instance. *Id.*

The actual value of the funding stream – and thus the value of the remaining assets – has not been determined by this Court (or by the district court). The CAC

filed a motion in the district court seeking a determination of the value of the Initial Payment with respect to the funding stream. That motion was fully briefed and argued and remains under advisement by the district court. The district court's Order erroneously characterizes both this Court's opinion and the procedural status of the issue in its own court.

E. The District Court Erred As A Matter Of Law By Refusing To Consider The Appellants' Expert Analysis And By Denying Appellants The Opportunity To Be Heard As Required By The Plan.

The SFA makes clear that the judicial process for determining the distribution of Second Priority Payments is to be implemented through a motion and hearing process and guarantees the parties identified in the SFA, including the Appellants, "the opportunity to be heard with respect to the [Finance Committee's] motion." SFA, RE #826-2, Page ID #13285, §7.03(a). Moreover, due process guarantees Appellants this right to be heard, and to be heard meaningfully. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner.") (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) ("the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society").

Below, Appellants submitted expert reports and analyses addressing the significant limitations in the Independent Assessor's calculations, showing not only that the calculations fail to address the standard governing Second Priority Payments but that they do not attempt to quantify any sort of "confidence interval" or other depiction of uncertainty or risk of error. Hinton Declaration, RE #826-5, ¶¶ 80-82 (filed under seal). This information was clearly relevant to the court's determination.

Nonetheless, the district court refused to consider any of these submissions on the ground that "no provision" in the SFA "requires" or otherwise authorizes any party other than the Finance Committee in conjunction with the Independent Assessor to "submit any projections or financial analysis" to the court.[25] Order,

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[25] The district court's Order mischaracterizes the Appellants' expert submission. For example, the district court incorrectly stated that Appellants argued it "must consider the expert analysis (Fred Dunbar's testimony) submitted at the Confirmation Hearing" (Order, RE #934, Page ID #15775) when in fact the Appellants' expert was Paul Hinton and his analysis was prepared specifically for the Motion. Indeed, it was the Finance Committee and the CAC that argued that Dr. Dunbar's testimony at the confirmation hearing somehow supports the distribution of Second Priority Payments now (*see, e.g.*, Motion, RE #814, Page ID #12353 (n.3); CAC Resp., RE #825, Page ID #13191-92), and Appellants argued that illustration did "not and cannot provide the analysis or support demanded by Section 7.03(a)." Appellants' Resp., RE #826, Page ID #13235 (n.18).

Further, the district court appeared to view the Appellants' submission as a competing financial analysis – but it was instead an analysis of risk factors present in the Indpendent Assessor's methodology and calculations. In particular, Appellants' expert analyzed the methods and assumptions applied in the report of

(Footnote continued)

RE #934, Page ID #15775-76. But this statement is not correct: the SFA not only does not prohibit Appellants from submitting their own expert reports, it specifically affords them a right to be heard, *see* SFA, RE #826-2, Page ID #13285, §7.03(a), and an opportunity to "file a motion ***or take any other appropriate actions*** to enforce or be heard in respect of the obligations in the Plan and in any Plan Document." *Id.* at Page ID #13272, §4.09(c)(v) (emphasis added).

Indeed, the SFA vests broad latitude in the parties to take action or submit documents to ensure that the limited Settlement Fund assets are used in strict accordance with the requirements set forth in the Plan and SFA. Section 4.09(c)(v) and Section 7.03(a) of the SFA clearly provide a basis and a mechanism for the

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the Independent Assessor to identify unquantified risks and uncertainty. *See, e.g.*, Appellants' Sur Reply, RE #858-1, Page ID #14451.

Moreover, the district court erroneously stated that "throughout the years…no objections [to the Independent Assessor's Reports] have been brought to the Court's attention that the Reports have been misleading or inaccurate." Order, RE #934, Page ID #15776. That is simply not true. The Appellants repeatedly questioned and challenged the Independent Assessor's methodology for failing to consider the underlying incidence of compensable conditions in the claimant population – a factor that is unquestionably relevant – and failing to quantify the risk that the distribution of Premium Payments would deplete the Settlement Fund. *See* Appellants' Reply, RE #846, Page ID #14288. But whether or not objections were raised with respect to reports that concluded repeatedly that the distribution of Premium Payments could threaten solvency is irrelevant. Section 7.03(a) provides the mechanism for critiquing any report whenever it is being used to support the distribution of Second Priority Payments.

Appellants to submit argument and analysis demonstrating the risk that an unknown number of future claims – that is, claims of tens of thousands of claimants who filed timely proofs of claims but who still have until June 2019 to file their Disease Claims – might not be paid in full if the Settlement Fund is depleted by payment of Second Priority Payments. Thus, far from prohibiting Appellants from submitting an expert analysis, the Plan Documents expressly provide for it.

If the Parties had intended to limit the scope of the district court's obligations, they could have provided that the Independent Assessor's calculations are determinative and there would be no need for either the motion and hearing process or for the district court to find that First Priority Payments are assured. The strong language of Section 7.03(a) requires the district court to consider the full record and to affirmatively find that First Priority and all other higher priority payments are assured before authorizing the distribution of lower priority payments.

The district court's failure to review or consider the Appellants' expert analysis constitutes legal error. *See Hand v. Cent. Transp., Inc.*, 779 F.2d 8 (6th Cir. 1985). In *Hand*, this Court reversed and remanded a district court's grant of summary judgment because the district court did not consider objections and an expert report proffered by plaintiffs. *Id.* at 11. There, a motion for summary

judgment was referred to a magistrate who issued a Report and Recommendation that the motion be granted. *Id.* at 10. The plaintiff then properly submitted objections to the magistrate's report, along with an expert affidavit. *Id.* at 11. The district court "adopted the Magistrate's Report and Recommendation without consideration on the record of Hand's objections." *Id.* at 10. This Court reversed, because the district court could not "ignore evidence submitted by either party, unless that evidence as a matter of law is without basis." *Id.* Similarly, the Court should reverse the Order here because the district court granted the Motion without "consideration on the record of [Appellant's] objections" or the expert declaration submitted with those objections.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse and vacate the Order. Appellants further request that this Court remand with instructions to the district court that it only authorize Second Priority Payments if there is "assurance" that all First Priority Payments will be made and, in doing so, clarify that if such assurance exists, the Finance Committee cannot discriminate among Second Priority Payments and instead must make all such payments in equal proportion and at the same time, that the Litigation Fund assets are not available to fund any deficit created by payment of Second Priority

Payments, and that it must afford Appellants the meaningful right to be heard required by the Plan and Plan Documents.

Dated: April 23, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), this brief contains 12,095 words.

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CERTIFICATE OF SERVICE

I certify that on April 23, 2014, I electronically filed a copy of the foregoing Brief of Appellant Dow Corning Corporation, Debtor's Representatives, The Dow Chemical Company, Corning Incorporated with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-00005)

RE #	Description of Filing	Page ID #
814	10/7/11 Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments.	12350-12367
814-3	Annex B to Settlement Facility and Fund Distribution Agreement - Settlement Grid - Personal Injury Claims	12412
814-4	Funding Payment Agreement (as amended as of June 1, 2004)	12421; 12423
814-13	Report of Independent Assessor End of Fourth Quarter 2010 Preliminary Report May 20, 2011 (Filed Under Seal)	12565-12566; 12574-12576; 12586-12595; 12608
825	11/11/11 Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments.	13191-13216
826	11/11/11 Opposition of Dow Corning Corporation, the Debtor's Representatives and the Shareholders to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments.	13217-13250
826-2	6/1/04 Settlement Facility and Fund Distribution Agreement	13259-13261; 13267; 13272; 13280-13281; 13283; 13285-13286; 13289-13290; 13291
826-3	6/1/04 Amended Joint Plan of Reorganization	13321; 13331-13332; 13345-13349; 13366; 13368-13369
826-4	6/1/04 Amended Joint Plan of Reorganization (continued)	13392
826-5	11/11/11 Declaration of Paul J. Hinton (Filed Under	All

	Seal)	
826-6	11/10/11 Declaration of William Barbagallo	13411-13425
826-7-826-19	11/10/11 Declaration of Georgene M. Vairo with attachments	13426-13567
836	11/28/11 Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents.	14183-14199
844	12/23/11 The Finance Committee's Reply to Dow Corning's Opposition to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments.	14229-14267
846	12/23/11 Reply of Dow Corning Corporation, the Debtor's Representatives and the Shareholders to the Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments.	14278-14293
848	12/23/11 Reply of Claimants' Advisory Committee in Further Support of Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments.	14315-14345
858-1	1/25/12 Sur Reply of Dow Corning Corporation, the Debtor's Representatives and the Shareholders with Respect to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments.	14446-14679
917	8/5/13 Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment.	15662-15683
922	9/9/13 Opposition of Dow Corning Corporation to the Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment.	15688-15712
923	9/27/13 Reply in Further Support of Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment.	15713-15728
934	12/31/13 Memorandum Opinion and Order Regarding Partial Premium Payment Distribution Recommendation by the Finance Committee.	15761-15779

935	1/16/14 Dow Corning, Debtor's Representatives and Shareholders' Notice of Appeal to the Sixth Circuit.	15780-15802
936	1/16/14 Dow Corning Corporation, Debtor's Representatives and Shareholders' Motion to Stay the Court's Ruling Regarding Partial Premium Payment Distribution Recommendation by the Finance Committee Pending Appeal.	15803-15822
954	2/25/14 Order Denying Motion to Stay Pending Appeal.	15928-15934