

Case No. 11-2632

**United States Court of Appeals
for the Sixth Circuit**

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION,

Interested Party – Appellant,

v.

CLAIMANTS' ADVISORY COMMITTEE,

Interested Party – Appellee.

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

BRIEF OF APPELLANT DOW CORNING CORPORATION

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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.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334. This Court has jurisdiction to review the district court's November 28, 2011 final order pursuant to 28 U.S.C. § 1291. *See* RE #836, 11/28/11 Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents ("11/28/11 Order"). That Order determined Dow Corning Corporation's ("DCC") right to credits for accelerated payment of its funding obligations under the Amended Joint Plan of Reorganization (the "Plan"), i.e., payments made before it had an outstanding payment obligation. DCC filed a timely notice of appeal on December 20, 2011. *See* RE #841, 12/20/11 Notice of Appeal.

STATEMENT OF THE ISSUE FOR REVIEW

Whether the district court erred when it denied DCC credit adjustments totaling approximately \$220 million for seven categories of accelerated payments made by DCC, when the Plan plainly mandates that whenever a payment is made, future payment obligations must be adjusted to reflect the timing and amount of that payment on a net present value basis as of the Plan's June 1, 2004 Effective

Date, when the district court itself determined that DCC is entitled under the Plan to net present value adjustments, and when the failure to grant the adjustments violates the clear Plan mandate that “[i]n *no event* shall Dow Corning be required to fund . . . an amount in excess of” \$2.35 billion net present value.

STATEMENT OF THE CASE AND FACTS

This appeal arises out of DCC’s effort to enforce provisions of the Plan and the related Funding Payment Agreement (“FPA”) that cap DCC’s obligation to fund the resolution of silicone breast implant and other medical device claims at a maximum of \$2.35 billion net present value, calculated at the rate of 7% per annum, compounded annually, as of the Plan’s Effective Date (the “net present value funding cap” or “funding cap”).¹ The DCC bankruptcy was one of the largest and most contentious mass tort controversies of the last two decades. The issues that led to the Chapter 11 filing were hotly contested, and ultimately it took nine years to confirm and implement a plan that had the support of DCC and the vast majority of tort claimants.

The cornerstone of the Plan is a program for the resolution of tort claims that prescribes both a settlement and litigation option, funded by DCC at various intervals over a 16-year period, up to an aggregate cap of \$2.35 billion net present

¹ The net present value funding cap is calculated at the rate of 7%, compounded annually, as of the Effective Date. RE #714-5, FPA, p. 3, § 2.01.

value as of the Plan's June 1, 2004 Effective Date. That aggregate funding cap was the subject of arduous negotiations, and the Plan Documents are clear that “[i]n no event shall Dow Corning be required to fund . . . an amount in excess of a net present value of \$2,350,000,000” calculated at the 7% rate as of the Effective Date. RE #714-5, FPA, p. 3, § 2.01 (emphasis added). The express limit of \$2.35 billion net present value thus is a hard funding cap that may not be exceeded for any reason.

When DCC makes a payment, the Plan requires that credits and adjustments be made to reflect the timing and amount of that payment on a net present value basis as of the Effective Date. This consistent crediting and adjusting computation is mandatory under the Plan to ensure that the total of all DCC's payments does not exceed the \$2.35 billion net present value cap.

This dispute arose because DCC paid more than \$1 billion substantially in advance of the funding schedule outlined in the FPA, but the Claimants' Advisory Committee (“CAC”) contested DCC's request for proper credit for its accelerated payments as required by the Plan.² These credit adjustments, referred to at times in

² The FPA is a Plan Document that was executed by DCC, The Dow Chemical Company, Corning Incorporated, and the CAC. The Plan defines “Plan Documents” as

the Settlement Facility Agreement, the Dow Corning Settlement Program and Claims Resolution Procedures, the Litigation Facility
(Footnote continued)

the FPA as “Time Value Credits” or “NPV [net present value] adjustments” because they recognize the time value of the advance funding, are specifically intended and essential to maintain the Plan’s \$2.35 billion net present value funding cap. *See, e.g.*, RE #714-5, FPA, pp. 7, 11-12, §§ 2.02(d), 2.10(c).

Accordingly, DCC brought a motion in the district court seeking enforcement of the credits and adjustments mandated by the FPA. The CAC opposed almost all of the credits that DCC sought, and the district court denied most of DCC’s requested credit adjustments. In so doing, the district court failed to give effect to the plain language of the Plan, the FPA, and other Plan Documents and adopted an interpretation that violates the unambiguous mandate that DCC’s maximum payment obligation be capped at \$2.35 billion net present value. This denial of Time Value Credit adjustments will result in an increase over the hard \$2.35 billion net present value cap, in violation of the clear mandate of the Plan.

(Footnote continued from previous page)

Agreement, the Funding Payment Agreement, . . . , the Depository Trust Agreement, . . . and all other documents and exhibits . . . that aid in effectuating this Plan

RE #714-4, Plan, pp. 23-24, § 1.131.

I. BACKGROUND

This appeal arises out of the massive litigation involving allegations that silicone gel breast implants could cause certain autoimmune diseases.³ Litigation exploded in the early 1990s after the claims were described in a popular television show. Within a two-year period, the manufacturers of these products 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, DCC was forced to seek protection under Chapter 11 of the Bankruptcy Code because of the massive number of cases filed.⁴

DCC filed its Chapter 11 petition on May 15, 1995. RE #714-4, Plan, p. 23, § 1.126. In 1998, DCC and the representatives of the tort claimants – the Tort

³ This Court has previously discussed the history of DCC's bankruptcy proceedings and the Plan. *See, e.g., Class Five Nev. Claimants (00-2516) v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002); *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996).

⁴ The scientific consensus today is that there is “no elevated relative risk or odds ratio for an association of implants with disease.” Institute of Medicine, *Safety of Silicone Breast Implants*, p. 7 (Stuart Bondurant et al. eds. 1999), available at http://www.nap.edu/catalog.php?record_id=9602 (last accessed May 8, 2012); *see id.*, p. 197; *accord* *Silicone Gel Breast Implants, The Report of the Independent Review Group*, p. 6 (July 1998), available at <http://www.mhra.gov.uk/home/groups/dts-bi/documents/websiteresources/con2032510.pdf> (last accessed May 8, 2012).

Claimants' Committee ("TCC") – agreed to a Plan of Reorganization that provided a comprehensive settlement package for claimants. On November 30, 1999, the Bankruptcy Court issued an order confirming the Plan. RE # 836, 11/28/11 Order, p. 1. Following appeals and various delays, the Plan became effective on June 1, 2004. *Id.*

The Plan provides for the resolution of the breast implant and other medical device claims, offering tort claimants the option of settling their claims through a Settlement Facility or litigating their claims against a Litigation Facility. RE #714-4, Plan, pp. 38-41, §§ 5.4-5.4.2. Both facilities are funded through payments made to a Depository Trust. RE #714-16, 6/1/04 Second Amended and Restated Depository Trust Agreement ("DTA"), p. 5, § 2.03(b).⁵ The Plan memorializes the parties' agreement capping the aggregate amount that DCC can be obligated to pay at \$2.35 billion net present value and establishing the mechanism for adjusting DCC's future payment obligations to account for the actual amount and timing of payments to ensure that the aggregate funding cap is protected and that DCC does not overpay or underpay. RE #714-4, Plan, p. 37, § 5.3; RE #714-5, FPA, pp. 9-11, § 2.05.

⁵ The Depository Trust is synonymous with the Settlement Facility – Dow Corning Trust. RE #714-7, Settlement Facility and Fund Distribution Agreement, p. 3, § 2.05.

The FPA, the Plan Document that sets forth the basic terms of the funding obligation, contains an initial schedule of payments and provides for adjustments to that schedule to account for variations in the timing and amount of payments to enforce the net present value funding cap of \$2.35 billion. More specifically, the schedule in the FPA includes an “Initial Payment” (defined as \$985 million) and then provides for 16 “Annual Payment Ceilings,” expressed as nominal dollar amounts for each “Funding Period.” RE #714-5, FPA, pp. 3, 5, §§ 2.01(a), 2.01(b). Funding Period 1 starts on the first anniversary of the Effective Date, and each subsequent Funding Period commences on the next succeeding anniversary date. *Id.*, p. 5, § 2.01(b). The aggregate amount of the Initial Payment plus the 16 maximum annual payments equals \$2.35 billion on a net present value basis (adjusted at a rate of 7%, compounded annually, as required by the Plan), *if* the Initial Payment actually was paid on the Effective Date and *if* the full amount of each of the Annual Payment Ceilings actually was paid on its corresponding anniversary of the Effective Date. RE #714-3, Hinton Declaration, p. 4, ¶ 8.

This schedule provides the starting point for the funding process. The parties, however, recognized that payments would not be made on the exact dates specified in the schedule. Indeed, the funding procedures required by the FPA ensure that payments will not and cannot be made on the precise dates in the schedule. First the FPA requires that Insurance Proceeds received before the

Effective Date be paid to the Settlement Facility within 90 days after the Effective Date, even though there is no scheduled funding obligation before the first anniversary of the Effective Date. RE #714-5, FPA, p. 4, § 2.01(a)(ii). The FPA also requires that all Insurance Proceeds received after the Effective Date be paid immediately to the Settlement Facility even if there is no need for funding and even if those proceeds exceed the Annual Payment Ceiling then in effect. *Id.*, pp. 3-4, 7, §§ 2.01(a)(i), 2.02(c). Third, the FPA provides that, to the extent DCC is required to make payments other than Insurance Proceeds and the Initial Payment, such payments are to be made monthly in response to funding notices presented by the Claims Administrator of the Settlement Facility. *Id.*, pp. 6-7, §§ 2.02(a)-(b)(iv).

Because funding cannot and will not be made on an annual basis on each anniversary of the Effective Date, the FPA requires adjustments (either increases or decreases as appropriate) to DCC's annual funding ceilings for payments made before or after the funding dates set forth in the initial schedule. For example, if the total amount paid in a given year is less than that period's Annual Payment Ceiling, the difference between the amount paid and the Annual Payment Ceiling "rolls forward" and is added to the Annual Payment Ceiling for the next Funding Period along with a charge of 7% of the amount rolled forward. *Id.*, p. 7, § 2.02(e). The converse is also true: when the payments are higher than the Annual Payment

Ceiling, the next year's Ceiling is reduced by that difference plus a 7% credit for the early payment. *See, e.g., id.*, pp. 7, 9-11, §§ 2.02(d), 2.05. These adjustments (referred to variously in the FPA as "NPV [net present value]" or "Time Value Credit" adjustments (hereinafter referred to for convenience as "TVC adjustments")), *see, e.g., id.*, pp. 7, 11-12, §§ 2.02(d), 2.10(c), are necessary to ensure that the Plan's \$2.35 billion net present value funding cap is protected.⁶

The FPA provides for ongoing adjustments and also provides for a "true up" of the payment stream at the end of the last Funding Period "based on the timing of actual receipt of all payments previously made to the Settlement Facility." *Id.*, p. 10, § 2.05(a). The express purpose of this adjustment process is to ensure that the absolute funding cap remains inviolate.

This dispute arose because DCC, although not required to do so by the Plan, agreed to make the Initial Payment substantially in advance of the Plan's Effective Date as requested by the TCC. *See* RE #714-4, Plan, pp. 37, 55, §§ 5.3, 6.10; RE #714-16, DTA, p. 11, § 4.01(a). It also, as required by the FPA, paid Insurance Proceeds and other payments after the Effective Date but before relevant anniversary dates specified in the initial schedule. As of September 30, 2009 (the

⁶ Certain interest payments are expressly exempted from this process. *See infra* notes 7 & 23.

relevant date for purposes of this appeal), DCC's payments substantially exceeded its cumulative payment obligations under the FPA's Annual Payment Ceilings.⁷

II. THE MOTION

On January 8, 2010, after its efforts to have the Annual Payment Ceilings adjusted consensually proved unsuccessful, DCC filed a Motion to Enforce Application of Time Value Credits under the Amended Joint Plan of Reorganization and Related Documents ("Motion"). RE #714, 1/8/10 Motion.⁸ In the Motion, DCC sought TVC adjustments against its future funding obligations for its accelerated funding of the following eight categories of payments:

⁷ DCC's Motion addressed the issue of credit adjustments that had accrued as of September 30, 2009. Since that date, additional payments have been made to the Trust, and those payments generate the obligation to make adjustments to future Annual Payment Ceilings. The various values set forth in this brief relate only to funding payments as of September 30, 2009.

As of September 30, 2009, DCC had paid \$1.572 billion. RE #714-3, Declaration of Paul J. Hinton ("Hinton Declaration"), Atts. B, C; RE #714-6, Dow Corning Qualified Settlement Trust Fund Month Ended September 30, 2009 Report of the Financial Advisor (filed under seal). In nominal dollars, \$1,499,237,294, or more than 95% of the \$1.572 billion, exceeded DCC's payment obligations under the FPA's Annual Payment Ceilings. (These figures do not include \$92.9 million in interest that had accrued on \$905 million of the Initial Payment, which the FPA expressly exempts from DCC's total capped payment obligation and Annual Payment Ceilings. See RE #714-5, FPA, p. 3, § 2.01(a).)

⁸ The Motion was filed pursuant to Sections 8.7.3 and 8.7.5 of the Plan, which confer jurisdiction on the district court to resolve disputes regarding interpretation and implementation of the Plan and Plan Documents and to enforce the terms of the FPA. RE #714-4, Plan, p. 74, §§ 8.7.3, 8.7.5.

1. \$985 million Initial Payment, almost all of which was paid in 2001, several years before the June 1, 2004 Effective Date of the Plan;
2. \$18.4 million paid (via Insurance Proceeds) in April 2001 to settle Class 6D Claims;
3. \$211,456,278 in pre-Effective Date Insurance Proceeds paid in June 2004, in an amount that exceeded the Annual Payment Ceilings for Funding Periods 1 and 2;
4. \$2.9 million paid from DCC's MDL 926 escrow account on behalf of the Settlement Facility in June 2004 for pre-Effective Date access to MDL 926 Claims Office Materials so the Settlement Facility could prepare to process claims promptly after the Effective Date;
5. \$2,180,656 paid from DCC's MDL 926 escrow account in June and September 2004, when there was no outstanding Annual Payment Ceiling, so that approved claims and authorized expenses could be paid;
6. \$7.2 million paid in June 2004 for immediate distribution to Class 4A (Prepetition Judgment Claims) claimants;
7. \$214,363,369 in Excess Insurance Proceeds paid in June 2004; and

8. \$57,736,990 in Insurance Proceeds paid in Funding Period 3, when there was no outstanding Annual Payment Ceiling.⁹

DCC argued that the plain language of the Plan and the FPA establishing the absolute \$2.35 billion net present value funding cap required these adjustments. It showed that, as a matter of simple, elemental math, the TVC adjustments reducing the nominal payment obligations under the Annual Payment Ceilings were necessary to preserve the net present value of the funding cap, just as adjustments to increase DCC's nominal payment obligations would be necessary if there were a funding shortfall. It further showed that, absent these TVC adjustments, DCC could be required to pay as much as \$2.64 billion net present value rather than \$2.35 billion net present value over the life of the Plan, \$290 million more than the cap negotiated by the Plan Proponents (DCC and the TCC) and made a key term of the Plan.¹⁰

The CAC opposed the Motion. It acknowledged the \$2.35 billion net present value cap, and it did not challenge the calculations of DCC's expert

⁹ The date, amount, and source of each payment are set forth in Attachment B to the Hinton Declaration. RE #714-3, Hinton Declaration, Att. B.

¹⁰ The total nominal dollar value of the TVC adjustments accrued as of September 30, 2009 is \$370 million. *See* RE #714-3, Hinton Declaration, Att. E. The net present value effect of a failure to apply these credits to adjust the Annual Payment Ceiling is \$290 million. *See id.*, pp. 9-10, 12, ¶¶ 27, 33 & Atts. D, E.

showing that denial of the identified TVC adjustments could force DCC to overfund the Plan's \$2.35 billion net present value cap by \$290 million. Nonetheless, it disputed DCC's right to TVC adjustments for the accelerated payment of all but two categories of insurance proceeds. RE #731, 2/12/10 Response to Dow Corning Corporation's Motion to Enforce Application of Time Value Credits ("CAC Resp.").

III. THE DISTRICT COURT'S DECISION

On November 28, 2011, the district court issued its decision granting in part and denying in part the relief DCC requested. RE #836, 11/28/11 Order. The district court found the FPA to be unambiguous and, accordingly, construed its requirements as a matter of law without consideration of extrinsic evidence. *See, e.g., id.*, p. 16 ("The FPA is unambiguous.").¹¹ The district court acknowledged the Plan's \$2.35 billion net present value funding cap. *Id.*, p. 11. It also acknowledged DCC's right to net present value adjustments. *Id.*, p. 16. Nonetheless, it denied the Motion with respect to all but two of the adjustments sought, and limited the extent of the credit with respect to one of the two. *Id.*, pp. 9-15. It held that DCC was entitled to TVC adjustments for (1) pre-Effective Date Insurance Proceeds paid to the Trust after the Effective Date from the date of

¹¹ The district court never admitted into evidence the documents conditionally offered by the CAC. *See* RE #879, Oral Argument Transcript, pp. 57-58.

receipt by the Trust, but limited the TVC adjustment so that it applies only to the start of Funding Period 1; and (2) Excess Insurance Proceeds, defined in the FPA as Insurance Proceeds received between the Effective Date and the end of Funding Period 2. *Id.*, pp. 11-15. The TVC adjustments that the district court allowed amount to approximately 25% of the total TVC adjustments sought in DCC's Motion. In net present value terms, the district court's ruling increases the inviolate net present value funding cap by approximately \$220 million. *See* RE #714-3, Hinton Declaration, Att. E.

SUMMARY OF ARGUMENT

Although the district court recognized that DCC "is entitled to Net Present Value adjustments" in order to uphold the Plan's \$2.35 billion net present value funding cap, RE #836, 11/28/11 Order, p. 16, it gave that requirement no more than lip service, rejecting DCC's claimed credits for advance funding almost in their entirety. In holding that DCC was not entitled to TVC adjustments for all of its advance payments, the district court ignored the parties' clearly stated intent to cap DCC's funding obligation at \$2.35 billion net present value, and to do so by adjusting Annual Payment Ceilings to account for advance payments. It ignored the structure of the funding mechanism set forth in the FPA that requires ongoing adjustments to maintain the net present value aggregate. It ignored the true-up

provisions of the FPA. And it ignored basic mathematical principles that require the adjustments to preserve the Plan's funding cap.

The district court's holding contravenes controlling principles of New York contract law that require a contract to be construed to give effect to the parties' clearly stated intent and to all provisions of the agreement. It also improperly modifies the Plan by increasing DCC's funding obligation without its consent, in violation of Section 1127(b) of the Bankruptcy Code, 11 U.S.C. § 1127(b), and Plan provisions. Only by giving TVC adjustments for both pre- and post-Effective Date funding in excess of or at a time when there was no outstanding Annual Payment Ceiling can the Plan's net present value funding cap be enforced. Because the district court's ruling is contrary to Plan requirements and governing principles of New York law, it should be reversed.

STANDARD OF REVIEW

In *Dow Corning Corp. v. Claimants' Advisory Committee (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769 (6th Cir. 2010), this Court set forth the standard of review that governs appeals involving Plan interpretation in this particular bankruptcy case. This Court will review *de novo* whether a plan provision is ambiguous. If it determines that a plan provision is not ambiguous, it then will review the district court's construction of the provision *de novo*:

Our court is reasonably well-equipped to determine whether a plan provision is ambiguous – we construe contracts all the time – though

in this case we should be mindful that our blind spots with respect to how one provision might interrelate with others are likely much larger than are the district court's. On the whole, however, the determination whether a plan provision is ambiguous is not a point on which we substantially defer.

Id. at 772.

If this Court concludes that a plan provision is ambiguous, it will “defer in earnest” if the district court relied upon extrinsic evidence in choosing among the differing reasonable readings of the language. *Id.* If the district court concluded that the provision was not ambiguous, however, and so did not resort to extrinsic evidence, this Court will vacate and remand for an evidentiary hearing, because there is “no such assessment [of the parties’ extrinsic evidence] to which [it] can defer.” *Id.* at 773.

Accordingly, where, as here, the district court has determined that the provisions of the FPA at issue are not ambiguous and do not require resort to extrinsic evidence, this Court will determine for itself whether the FPA provisions are unambiguous. If it agrees that they are, it will review the district court’s decision *de novo*. If it determines that the FPA provisions are ambiguous, it should remand for an evidentiary hearing.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE PLAN DOCUMENTS REQUIRES TVC ADJUSTMENTS FOR ALL ADVANCE PAYMENTS

Section 5.3 of the Plan and Section 2.01 of the FPA establish DCC's maximum funding obligation. RE #714-4, Plan, p. 37, § 5.3; RE #714-5, FPA, p. 3, § 2.01. Pursuant to Section 2.01 of the FPA, DCC is required:

to make funding payments to the Settlement Facility up to a maximum aggregate amount of \$3,172,000,000, subject to adjustment as described in this Agreement *in order to achieve a net present value of \$2,350,000,000 compounded annually as of the Effective Date after applying a discount rate of 7% per annum.*

RE #714-5, FPA, p. 3, § 2.01. (emphasis added). Section 2.01 further provides that “[i]n no event shall Dow Corning be required to fund (whether with Insurance Proceeds or cash) an amount in excess of a net present value of \$2,350,000,000 discounted at the rate of 7% per annum to the Effective Date.” *Id.* (emphasis added).

The Plan required DCC, on or shortly after the Effective Date, to make an initial cash payment of \$985 million (“Initial Payment”) plus the interest that accrued on \$905 million of that \$985 million. RE #714-4, Plan, p. 37, § 5.3; *see id.*, p. 55, § 6.10. The Plan further provided that, if an appeal from the Confirmation Order raised a release/funding issue, as did occur, DCC “shall timely pay to the Settlement Facility that portion of the initial cash payment of \$985 million and such other subsequently available funds which [it] is obligated to pay

under the terms of the [FPA].” *Id.*, pp. 63-64, § 7.4. The FPA did not obligate DCC to pay the Initial Payment before the Effective Date, and DCC disputed any obligation to make any payment under the Plan other than the minimal amount necessary to set up administrative systems for processing claims so that processing could begin promptly after the Effective Date.¹² The TCC, however, wanted the Settlement Facility to start processing claims before the Effective Date so it could begin paying approved claims promptly after the Effective Date and insisted that DCC pay the entire Initial Payment before the Effective Date.

In resolving this dispute, the parties negotiated the Depository Trust Agreement (“DTA”), which governs the mechanics of custody and distribution of assets. RE #714-16, DTA. The parties outlined a schedule for the pre-Effective Date payment of the Initial Payment in accordance with the TCC’s demands. Pursuant to the provisions of the DTA, DCC made the Initial Payment in a series of payments starting promptly after execution of the DTA (which occurred on March 27, 2001). *Id.*, p. 11, § 4.01(a). The first payment, in the amount of \$30 million, was made on April 2, 2001. *See* RE #714-3, Hinton Declaration, Att. B. Almost all of the remaining payments were made before the end of 2001. *See id.*

¹² Section 7.4 of the Plan provided that, “[d]uring the pendency of the appeal, the Settlement Facility shall commence those operations necessary and appropriate to begin processing Claims promptly after the Effective Date.” RE #714-4, Plan, pp. 63-64, § 7.4.

The last payment was made in May 2004. *See id.* The DTA expressly provides that “[n]othing in this Trust Agreement alters or modifies the manner of calculating the Net Present Value in the Plan as of the Effective Date.” RE #714-16, DTA, p. 12, § 4.01(c).

After the Initial Payment, the FPA defines 16 annual funding periods and prescribes an “Annual Payment Ceiling” for each such period. Funds are to be paid to the Trust in two ways: Insurance Proceeds are to be paid to the Trust as received and DCC is to pay cash if and as necessary to pay claims and administrative expenses. The Annual Payment Ceilings are the maximum amounts DCC can be required to fund in each Funding Period.¹³ The Annual Payment

¹³ Section 2.01(b) of the FPA provides:

For each twelve-month period commencing on the first anniversary of the Effective Date of the Plan (each, a “Funding Period”), Dow Corning shall be obligated to fund up to the amount of the “Annual Payment Ceiling” listed in this subsection (subject to adjustment as provided in this Agreement) to the Settlement Facility, . . . , until such payments have been made, as follows:

<u>Funding Period</u>	<u>Annual Payment Ceiling</u> [Nominal Dollars]
Funding Period 1:	\$47,000,000
Funding Period 2:	103,000,000
Funding Period 3:	374,000,000
Funding Period 4:	204,000,000
Funding Period 5:	205,000,000
Funding Period 6:	113,000,000

(Footnote continued)

Ceilings, however, are to be adjusted (as explained in more detail below) to maintain the aggregate net present value of the payments after accounting for the actual amount and timing of payments. The funding schedule in the FPA, therefore, is the starting point, and adjustments to the payment obligations are to be made throughout the life of the Plan.

The 16 Annual Payment Ceilings total \$1.365 billion net present value (when discounted to the Effective Date at the rate of 7% per year, compounded annually, assuming that the entire amount was paid on the first day of the Funding Period). If the Initial Payment had been paid on the Effective Date, then its net

(Footnote continued from previous page)

Funding Period 7:	31,000,000
Funding Period 8:	149,000,000
Funding Period 9:	149,000,000
Funding Period 10:	186,000,000
Funding Period 11:	189,000,000
Funding Period 12:	188,000,000
Funding Period 13:	80,000,000
Funding Period 14:	34,000,000
Funding Period 15:	73,500,000
Funding Period 16:	<u>61,500,000</u>
	[\$2,187,000,000]

RE #714-5, FPA, p. 5, § 2.01(b). Funding Period 1 commenced on June 1, 2005 and ended on May 31, 2006. Funding Period 16 will commence on June 1, 2020 and end on May 31, 2021. Section 4.01(b) of the DTA required DCC, after the Effective Date, “to fund all subsequent payments into the Trust in accordance with the Funding Payment Agreement taking into account payments previously made.” RE #714-16, DTA, p. 12, § 4.01(b).

present value would have equaled \$985 million. The two amounts (\$985 million and \$1.365 billion) together equal \$2.35 billion net present value. RE #714-3, Hinton Declaration, p. 3, ¶ 7. Thus, the amount of each initial Annual Payment Ceiling was set so that DCC's total maximum funding payments would equal the \$2.35 billion net present value cap if:

- the Initial Payment was made on the Effective Date;
- no additional funds were paid between the Effective Date and the first day of Funding Period 1;
- the full amount of each Annual Payment Ceiling was paid on the first day of each Funding Period; and
- no additional funds were paid between the first day of each Funding Period and the start of the next Funding Period.

But as noted, the FPA and the DTA require payments to be made at other times. For example, in addition to the funding of the Initial Payment, the FPA required DCC to:

- turn over Insurance Proceeds it received before the Effective Date (“pre-Effective Date Insurance Proceeds”) no later than 90 days after the Effective Date, which was nine months before the start of Funding Period 1, RE #714-5, FPA, p. 4, § 2.01(a)(ii);

- pay Insurance Proceeds it received after the Effective Date but before the start of Funding Period 1, as well as Insurance Proceeds received thereafter, immediately upon receipt to the Trust even if (in the case of the former) there was no Annual Payment Ceiling in effect, or (in the case of the latter) the then-current Annual Payment Ceiling was fully funded, *id.*, pp. 3-4, 7, §§ 2.01(a)(i), 2.02(c);¹⁴ and
- make cash payments up to the applicable adjusted Annual Payment Ceiling on a monthly basis to the extent funds are needed to pay claims and administrative expenses, *id.*, p. 6, §§ 2.02(a), 2.02(b)(i).¹⁵

¹⁴ Insurance Proceeds payable after the Effective Date are to be paid directly to the Trust. If any are paid to DCC, it is required to transfer them to the Trust within five business days of receipt even if the Annual Payment Ceiling has been fully funded. All Insurance Proceeds are available to pay Fundable Expenditures immediately upon receipt, i.e., before they are applied to any outstanding Annual Payment Ceiling. RE #714-5, FPA, pp. 4-5, 7, §§ 2.01(a)(i), 2.01(a)(iv), 2.02(c).

¹⁵ Section 2.02 of the FPA sets forth DCC's funding obligations in the event that funds are needed to pay claims and administrative expenses. It requires the Claims Administrator to provide DCC a monthly "Projected Funds Notice" of the amount of money expected to be needed to pay Fundable Expenditures in each of the following three months in excess of available funds plus a specified cash reserve. It also requires the Claims Administrator to provide DCC a monthly "Actual Expenditures Notice" setting forth the Fundable Expenditures actually incurred in the immediately preceding month that DCC is required to fund. The Projected Funds Notice and the Actual Expenditures Notice may not exceed the amount by which the applicable adjusted Annual Payment Ceiling exceeds DCC's previous funding payments that are applied to that Funding Period. RE #714-5, FPA, p. 6, § 2.02. DCC's obligation to make cash payments in accordance with the foregoing (Footnote continued)

Because of this variability in funding payments, the FPA requires the amounts of the Annual Payment Ceilings to be periodically adjusted up or down based on the actual timing and amount of payments in order to preserve the Plan's \$2.35 billion net present value funding cap. If the total amount paid in a particular year is less than that period's Annual Payment Ceiling, the difference "rolls forward" to increase the Annual Payment Ceiling for the next Funding Period along with the 7% TVC adjustment on the amount rolled forward. *See id.*, p. 7, § 2.02(e); RE #714-3, Hinton Declaration, pp. 4-6, ¶¶ 8-11, 15.¹⁶ Conversely, if the total amount paid exceeds the outstanding funding obligation or is paid in advance of the anniversary date assumed in the schedule, the excess is credited against the next succeeding Annual Payment Ceiling along with a 7% credit on the excess. *See, e.g.*, RE #714-5, FPA, pp. 7, 9-11, §§ 2.02(d), 2.05; RE #714-3, Hinton Declaration, pp. 4-6, ¶¶ 8-11, 15.¹⁷

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schedule is "subject to the [adjusted] Annual Payment Ceilings." *Id.*, pp. 6-7, § 2.02(b)(iii).

¹⁶ "The amount of such increase shall equal the difference between the amount funded to the Settlement Facility in such Funding Period and the Annual Payment Ceiling for such Funding Period (as adjusted), plus 7%." RE #714-5, FPA, p. 7, § 2.02(e).

¹⁷ DCC's expert explained the calculations as follows:

The procedures to adjust Annual Payment Ceilings to account for early payments and deferred payment obligations involve simple time

(Footnote continued)

The following two charts illustrate the effect of deferring in part and accelerating in part an Annual Payment Ceiling, in this case Funding Period 4's Annual Payment Ceiling:

(Footnote continued from previous page)

value of money calculations to preserve the NPV of the sum of actual payments and future payment obligations (the \$2.35 billion NPV cap). The adjustment for early payment involves computing an amount of interest (Time Value Credit) to determine the equivalent value of a timely payment. This Time Value Credit is then deducted from the next Annual Payment Ceiling as if the nominally higher equivalent timely payment had been made. The adjustment for deferred payment obligations (*i.e.*, roll forward of payment obligations) involves computing the equivalent value of the deferred amount as of the first day of the next Funding Period. An amount of interest is added to the nominal amount of the deferred payment as of the beginning of the Funding Period to determine the equivalent value of a deferred payment at the beginning of the next Funding Period. This equivalent value is added to the next Annual Payment Ceiling.

RE #714-3, Hinton Declaration, p. 6, ¶ 15.

Total Nominal Payments Increase If Funding Is Deferred

	FPA's Scheduled Annual Payment Ceilings (in millions)	Effect of Deferring Payment in FP 4
Effective Date	\$ 985.0	\$ 985.0
FP 1	\$ 47.0	\$ 47.0
FP 2	\$ 103.0	\$ 103.0
FP 3	\$ 374.0	\$ 374.0
FP 4	\$ 204.0	\$ 104.0
FP 5	\$ 205.0	\$ 312.0
FP 6	\$ 113.0	\$ 113.0
FP 7	\$ 31.0	\$ 31.0
FP 8	\$ 149.0	\$ 149.0
FP 9	\$ 149.0	\$ 149.0
FP 10	\$ 186.0	\$ 186.0
FP 11	\$ 189.0	\$ 189.0
FP 12	\$ 188.0	\$ 188.0
FP 13	\$ 80.0	\$ 80.0
FP 14	\$ 34.0	\$ 34.0
FP 15	\$ 73.5	\$ 73.5
FP 16	\$ 61.5	\$ 61.5
Total	\$ 3,172.0	\$ 3,179.0
NPV	\$ 2,350.0	\$ 2,350.0

Funding Period 4:
Deferred payment of \$100 million

Funding Period 5 Adjusted Ceiling:
\$205 million *Ceiling for FP 5*
+\$100 million *Deferred payment*
+\$ 7 million *Adj. (7%×\$100.0)*
\$312 million

Net present value is preserved. Nominal payments increase by \$7 million.

As this chart shows, if \$100 million of Funding Period 4's \$204 million (nominal) Annual Payment Ceiling were deferred, Funding Period 5's Annual Payment Ceiling would increase from \$205 million (nominal) to \$312 million (nominal) because \$100 million of the \$204 million Funding Period 4 Annual

Payment Ceiling would be added to Funding Period 5's Annual Payment Ceiling along with the 7% credit adjustment of \$7 million (which is calculated by multiplying the \$100 million deferred payment by the 7% adjustment factor). *See Id.* If this adjustment were not made, the aggregate net present value of DCC's payment obligation would be less than \$2.35 billion.

Conversely, as the following chart shows, if payment of \$100 million of Funding Period 5's \$205 million (nominal) Annual Payment Ceiling were accelerated by payment in Funding Period 4, then Funding Period 5's Annual Payment Ceiling would decrease from \$205 million (nominal) to \$105 million (nominal), and then would decrease further to \$98 million to account for the TVC adjustment of \$7 million (which is calculated by multiplying the \$100 million accelerated payment by the 7% TVC adjustment factor) to preserve the net present value cap. *See id.* If this adjustment were not made, the aggregate net present value of DCC's payment obligation would be greater than \$2.35 billion.

Total Nominal Payments Decrease if Funding Is Accelerated

	FPA's Scheduled Annual Payment Ceilings (in millions)	Effect of Early Payment in FP 4
Effective	\$ 985.0	\$ 985.0
FP 1	\$ 47.0	\$ 47.0
FP 2	\$ 103.0	\$ 103.0
FP 3	\$ 374.0	\$ 374.0
FP 4	\$ 204.0	\$ 304.0
FP 5	\$ 205.0	\$ 98.0
FP 6	\$ 113.0	\$ 113.0
FP 7	\$ 31.0	\$ 31.0
FP 8	\$ 149.0	\$ 149.0
FP 9	\$ 149.0	\$ 149.0
FP 10	\$ 186.0	\$ 186.0
FP 11	\$ 189.0	\$ 189.0
FP 12	\$ 188.0	\$ 188.0
FP 13	\$ 80.0	\$ 80.0
FP 14	\$ 34.0	\$ 34.0
FP 15	\$ 73.5	\$ 73.5
FP 16	\$ 61.5	\$ 61.5
Total	\$ 3,172.0	\$ 3,165.0
NPV	\$ 2,350.0	\$ 2,350.0

Funding Period 4:
Accelerated payment of \$100 million

Funding Period 5 Adjusted Ceiling:

\$205 million	<i>Ceiling for FP 5</i>
- \$100 million	<i>Accelerated payment</i>
- \$7 million	<i>TVC (7%×\$100.0)</i>
\$98 million	

NPV is preserved.
Nominal payments decrease by \$7 million.

These types of adjustments to the Annual Payment Ceilings are mandated to “ensure that the [net present value] of payments and future payment obligations

remains fixed at \$2.35 billion, [although] nominal aggregate funding obligation[s] increase with deferrals and decrease with early payments.” *Id.*, pp. 4-5, ¶ 11.¹⁸ Stated differently, net present value and Time Value Credit adjustments are synonymous ways to describe a methodology designed to value a stream of payments as of a distinct point in time. The “[f]ail[ure] to provide either a full Time Value Credit for an early payment or provide a time value adjustment to a deferred payment would result in the failure to preserve the \$2.35 billion [net present value] cap on the sum of actual payments and future payment obligations” RE #714-3, Hinton Declaration, p. 6, ¶ 16.

¹⁸ As explained by DCC’s expert:

The time value of money is a fundamental principle in economics and finance and describes how much less a sum of money is worth if it can only be spent in the future rather than immediately. The time value of money can be expressed as a discount rate. The [net present value] of a stream of historical cash flows can also be computed by accruing interest (compounding) at the same rate that reflects the time value of money. Similarly, the equivalent future value of a current sum can be computed by adding the appropriate amount of interest to the current nominal value.

RE #714-3, Hinton Declaration, pp. 5-6, ¶ 14 (footnote omitted). The CAC did not object to the introduction of Mr. Hinton’s Declaration “to the extent it [was] offered to explain the concept of the time value of money and to provide numerical computations of the potential TVC adjustments.” RE #731, CAC Resp., p. 10 n.2. The CAC objected to the Declaration only “to the extent it purports to state what the Plan documents mean or require, as those issues are solely the province of the Court.” *Id.*

To enforce the requirement for ongoing adjustments that take into account the actual timing and amount of payments in order to protect the net present value funding cap, the FPA requires the Claims Administrator to calculate adjustments and to give notice to the parties 90 days before the start of any Funding Period for which an adjustment is computed. RE #714-5, FPA, pp. 9-10, § 2.05(a)(i).¹⁹ The FPA further sets forth procedures for the review of and objection to any proposed adjustments (or failure to make adjustments). *Id.*, p. 10, §§ 2.05(a), (b), (c). In addition, the FPA requires the Claims Administrator to conduct a “true up” at the end of the Plan. *Id.*, p. 10, § 2.05(a)(ii). Within 90 days after the end of the last funding period (Funding Period 16), the Claims Administrator is required to calculate any shortfall in funding from the Plan’s \$2.35 billion net present value funding cap:

[T]he Claims Administrator shall make a determination, ***based on the timing of actual receipt of all payments previously made*** to the Settlement Facility, of the amount necessary to achieve payments of a total net present value of \$2,350,000,000 compounded annually as of the Effective Date after applying a discount rate of 7% per annum.

Id. (emphasis added).

¹⁹ This requirement does not apply to adjustments required under Section 2.03 for Excess Insurance Proceeds, the only provision of the FPA that contains a specific formula for the application of credits. RE #714-5, FPA, p. 9, § 2.05.

The FPA thus establishes the unequivocal obligation to protect the net present value funding cap through ongoing adjustments to the payment obligations. Within this framework, several FPA provisions specifically address TVC adjustments in discrete circumstances that the parties were able to anticipate in 1998, when the schedule was devised:

- Section 2.01(a)(ii) requires Insurance Proceeds received before the Effective Date to be paid to the Trust within 90 days after the Effective Date, nine or more months before the start of the first scheduled Annual Payment Ceiling in Funding Period 1, and provides for a TVC adjustment for this advance funding from its date of receipt by the Trust. *Id.*, p. 4, § 2.01(a)(ii).²⁰
- Sections 2.03(a)-(b) require the credit for Insurance Proceeds received between the Effective Date and the start of Funding Period 1 (when there was no Annual Payment Ceiling in effect), and between the start of Funding Period 1 and the end of Funding Period 2, to the extent those proceeds exceed the Annual Payment Ceilings for those

²⁰ The requirement of payment within 90 days recognized the general rule that Insurance Proceeds are to be paid to the Trust upon receipt but also recognized the fact that Insurance Proceeds received pre-Effective Date were being held in escrow accounts that would be subject to termination provisions, and so could not be paid immediately. RE # 714-16, DTA, p. 11, § 4.01(a).

Funding Periods (collectively defined as “Excess Insurance Proceeds”), to be spread out over several Funding Periods in stated percentages with the 7% TVC adjustment. RE #714-5, FPA, pp. 7-8, §§ 2.03(a)-(b).²¹

- Section 2.02(d) requires a TVC adjustment for all Insurance Proceeds received after the end of Funding Period 2 for any amount in excess of the outstanding Annual Payment Ceiling. *Id.*, p. 7, § 202(d).²²
- Section 2.10(c) provides that DCC “shall receive” a TVC adjustment (which it refers to as an “NPV adjustment”) for payments to the Class 6D Fund established to pay Australia Breast Implant Settlement Option claims made nine months or more before the start of the first

²¹ Although these Excess Insurance Proceeds are available immediately for use by the Settlement Facility, RE #714-5, FPA, p. 5, § 2.01(a)(iv), because of concerns that cash flow during the early years of the Plan might be insufficient to pay claims on a timely basis, credit for these Excess Insurance Proceeds is deferred until Funding Period 5, *id.*, p. 8, § 2.03(b). Credit against Annual Payment Ceilings is then spread out in varying percentages over an additional three-year period. *Id.* As noted, “[t]o the extent that the amount to be credited . . . exceeds the relevant Annual Payment Ceiling obligation, **the excess amount . . . including the applicable Time Value Credit,**” is to be “credited against Annual Payment Ceilings due in the immediately succeeding Funding Period(s).” *Id.* (emphasis added). The true-up provisions of FPA Section 2.05(a)(ii) take into account these credit deferrals.

²² This provision recognizes the requirement that Insurance Proceeds be paid immediately to the Trust regardless of whether Annual Payment Ceilings were satisfied.

Annual Payment Ceiling in Funding Period 1. *Id.*, pp. 11-12,

§ 2.10(c).

II. THE DISTRICT COURT MADE FUNDAMENTAL ERRORS OF LAW IN DENYING TVC ADJUSTMENTS FOR ALL OF DCC'S ADVANCE PAYMENTS

The FPA mandates that “[*i*]n no event” may DCC be required to fund more than \$2.35 billion net present value, calculated at the 7% per annum rate as of the Effective Date from the date of payment. *Id.*, p. 3, § 2.01 (emphasis added). This mandate cannot be met without the adjustment mechanism outlined above.²³

The district court acknowledged this mandate and DCC’s right to “Net Present Value adjustments” at the 7% per annum rate. RE #836, 11/28/11 Order, pp. 11, 16.²⁴ Nevertheless, it concluded that Time Value Credit adjustments somehow were distinct from and different from net present value adjustments. *Id.*, p. 16. Despite its determination that DCC was entitled to net present value adjustments, the district court disallowed the necessary adjustments and held,

²³ The FPA makes an exception for adjustments for only two categories of payments, both of which involve additional payments to the Trust that are not to be included in the calculation of the Plan’s \$2.35 billion net present value funding cap: the interest on \$905 million of the Initial Payment; and the interest on any defaulted payments (“exempt interest”). *See supra* note 6. These expressly stated exceptions prove the rule.

²⁴ As the district court recognized, “[t]he parties are clear in their intent that the Net Present Value [of DCC’s funding] not exceed \$2.35 billion and expressly so note in various places in the Plan documents.” RE #836, 11/28/11 Order, p. 11.

instead, that DCC was entitled to adjustments only in the limited instances where the phrase “Time Value Credit” appears in the FPA. *Id.*, pp. 11-15. The district court determined that because “[t]he FPA only mentions Time Value Credit in certain instances,” “[t]he parties are clear in their intent that only certain funds are allowed Time Value Credit.” *Id.*, p. 16.

The Plan and the FPA are contracts governed by New York substantive law. RE #714-4, Plan, p. 58, § 6.13; RE #714-5, FPA, p. 20, § 5.08. As this Court recognized, “[s]tate law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written,” without resort to extrinsic evidence. *Official Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 676 (6th Cir. 2006).

Under New York law, courts are required to give effect to the parties’ intent as expressed in their contract. *Shaw Grp. Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003). “‘A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.’” *Adams v. Suozzi*, 433 F.3d 220, 228 (2d Cir. 2005) (citations omitted); *accord Brad H. v. City of New York*, 951 N.E.2d 743, 748 (N.Y. 2011) (contract should not be construed in manner that “would undermine its overarching purpose”). A contract must be read as a whole,

and “[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.” *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 920 N.E.2d 359, 363 (N.Y. 2009) (citation omitted); see *Westbury Post Ave. Assocs. v. Great Atl. & Pac. Tea Co.*, 361 N.Y.S.2d 377, 378 (App. Div. 1974) (rejecting contract interpretation that would achieve an absurd result), *aff’d*, 346 N.E.2d 548 (N.Y. 1976).

It is the “goal” of a court “to interpret the language of the contract in a practical manner such that the parties’ reasonable expectations will be realized.’ ‘A contract should be construed in accordance with the parties’ purpose [and] a fair and reasonable interpretation, consistent with that purpose, must guide the courts in enforcing the agreement.’” *Discovision Assocs. v. Toshiba Corp.*, No. 08v3693(HB), 2009 WL 1373915, at *4 (S.D.N.Y. May 18, 2009) (citations omitted). It is a “cardinal principle[]” of contract construction under New York law that “[a] written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties.” *Brad H.*, 951 N.E.2d at 746.

Thus, where a contract, as here, “makes clear the parties’ over-all intention, courts examining isolated provisions “should then choose that construction which

will carry out the plain purpose and object of the [agreement].”” *Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998) (alteration in original) (citations omitted). They should construe each clause to give effect to “its intended purpose in the promotion of the primary and dominant purpose of the contract.” *Adams*, 433 F.3d at 228 (citation omitted). They should avoid distorting the meaning of a contract by giving “undue force . . . to single words or phrases.” *Id.* (citation omitted). They “should *not* adopt a construction of [a contractual provision] which would frustrate one of the explicit central purposes of the agreement.” *Ronnen v. Ajax Electric Motor Corp.*, 671 N.E.2d 534, 537 (N.Y. 1996) (emphasis added). An interpretation of a contract that “directly contravene[s] the express purpose of the contract is not a reasonable interpretation” and may not be adopted.

Discovision, 2009 WL 1373915, at *9; *see Westbury Post*, 361 N.Y.S.2d at 378.

The district court’s decision violates these fundamental principles of New York law. Its acknowledgement that DCC cannot be required to fund more than \$2.35 billion net present value and its holding that DCC is entitled to net present value adjustments cannot be reconciled with its denial of almost all of the TVC adjustments that DCC sought. The district court ignored the parties’ clearly expressed intent and the clear mandate to protect the net present value funding cap. It also erroneously read certain provisions of the FPA (those that use the phrase “Time Value Credit”) in isolation and without regard to the fundamental precepts

of contract interpretation, in which all provisions of a contract (particularly those that state its “primary and dominant purpose,” *Adams*, 433 F.3d at 228 (citation omitted)) must be accorded meaning. And it even ignored and refused to give meaning to provisions of the FPA that expressly include the term “Time Value Credit.”

First, the district court’s selective reading of the FPA fails to give effect to the FPA’s unambiguous, categorical requirement that “[i]n no event shall Dow Corning be required to fund . . . an amount in excess of a net present value of \$2,350,000,000 discounted at the rate of 7% per annum to the Effective Date.” RE #714-5, FPA, p. 3, § 2.01 (emphasis added); *see Adams*, 433 F.3d at 228; *Brad H.*, 951 N.E.2d at 748; *Riverside S.*, 920 N.E.2d at 363. The parties did not need, nor were they required, to include the phrase “Time Value Credit” (or “NPV adjustment”) in every paragraph of the FPA because the concept is fundamental to the funding process and was clearly expressed throughout the FPA.

Second, the district court erred in ignoring its own construction of the FPA by disallowing adjustments even in situations where the term Time Value Credit is expressly employed. As succinctly stated by DCC’s expert,

Any calculation that omits payments made in satisfaction of Dow Corning’s funding obligation, fails to apply associated Time Value Credits, or only applies associated Time Value Credits over a limited number of Funding Periods, will not preserve the \$2.35 billion NPV cap.

RE #714-3, Hinton Declaration, p. 12, ¶ 33.

In short, the district court ignored multiple provisions in Plan Documents establishing and reinforcing the requirement that TVC adjustments be applied to preserve the Plan's immutable net present value funding cap, including the "true-up" provision of the FPA. *See, e.g.*, RE #714-4, Plan, p. 37, § 5.3; RE #714-5, FPA, pp. 3, 7-12, §§ 2.01, 2.02(d), 2.03(b), 2.05(a)(ii), 2.10(c); RE #714-16, DTA, p. 12, § 4.01(c). It failed to recognize that, absent the TVC adjustments DCC requested in the Motion, the arithmetic simply does not work. It failed to recognize the structure and process established in the FPA specifically for the purpose of adjusting the Payment Ceilings to give effect to the funding cap. It also failed to recognize that when the parties wanted to exclude a payment from the net present value funding cap, e.g., exempt interest, they knew how to do so.

By increasing DCC's funding contribution, the district court also effected an improper Plan modification in contravention of Section 1127(b) of the Bankruptcy Code, which prohibits modifications to a plan that has been substantially consummated. It also violated the express language of the Plan, which prohibits any post-confirmation amendment unless in accordance with Section 1127(b) *and* mutually agreed upon by the Plan Proponents. RE #714-4, Plan, p. 84, § 11.4. Because the district court's decision increases the funding cap, it effects an

impermissible Plan modification barred by Section 1127(b) and the Plan in the absence of DCC's consent.

A. The District Court Erred in Denying a TVC Adjustment for DCC's Advance Payment of the Initial Payment

DCC paid the \$985 million Initial Payment several years before the Effective Date and sought a TVC adjustment for this advance payment as required under the FPA to protect the net present value funding cap. The district court denied this TVC adjustment because the FPA and the DTA do not use the specific words "Time Value Credit" in connection with the Initial Payment. RE #836, 11/28/11 Order, pp. 9-11.

The district court erred in denying the TVC adjustment. It ignored its own holding that DCC "is entitled to Net Present Value adjustments," *id.*, p. 16, the adjustment process that the FPA requires the Claims Administrator to undertake, RE #714-5, FPA, pp. 9-10, § 2.05, and the inescapable arithmetic that leads to only one conclusion: in order to protect the net present value funding cap, the Annual Payment Ceilings must be adjusted to account for the time and amount of any payment in relation to the Effective Date.²⁵ The district court also elevated form

²⁵ Only by engaging in a fiction can it be concluded that the funding cap is protected without the TVC adjustments that DCC sought, i.e., pretending for purposes of calculating the net present value of the funding cap that the Initial Payment was made on the Effective Date when it was not.

over substance by failing to read the contract as a whole and to construe the contract to give effect to its funding requirements. This is precisely what the law forbids. *See Adams*, 433 F.3d at 228; *Brad H.*, 951 N.E.2d at 748. By reading the phrase “Time Value Credit” in “‘isolat[ion] from the context’” of the entire contract and not “‘in light of the obligation as a whole,’” *Riverside S.*, 920 N.E.2d at 363 (citation omitted), the district court “frustrate[d] one of the explicit central purposes of the agreement,” *Ronnen*, 671 N.E.2d at 537, that “[i]n no event” may DCC’s funding obligations exceed the net present value of \$2.35 billion measured as of the Effective Date.

By giving “‘undue force . . . to [a] single word[] or phrase[],’” *Adams*, 433 F.3d at 228 (citation omitted), the district court also ignored the parties’ express provision in the FPA that makes clear that the TVC adjustments apply to any accelerated payment, including the Initial Payment, unless expressly exempted. The FPA provides that only one specific component of the funds paid in conjunction with the Initial Payment, the “[i]nterest paid on [\$905 million of] the Initial Payment[,] . . . shall not be included in calculating the payment of the net present value of \$2,350,000,000 under this Agreement or applied as an amount paid to the Settlement Facility toward any Annual Payment Ceiling.” RE #714-5, FPA, p. 3, § 2.01(a). The Initial Payment, therefore, is subject to the net present value calculation procedures.

This requirement is reinforced in another Plan Document that the district court ignored. The DTA expressly provides that the acceleration of the payment of the Initial Payment before the Effective Date does not “alter[] or modif[y] the manner of calculating the Net Present Value in the Plan as of the Effective Date.” RE #714-16, DTA, p. 12, § 4.01(c). That calculation methodology, and the adjustment requirements and true-up provisions of the FPA, require adjustments to the Annual Payment Ceilings for the early payment of the Initial Payment if the net present value of the Plan’s funding cap is to be maintained regardless of whether the adjustments are called “Time Value Credits” or “NPV adjustments” or, indeed, are explicitly mentioned at all. Sections 2.01, 2.02, and 2.05(a) of the FPA and Section 4.01(c) of the DTA cannot be read any other way.

The district court’s refusal to grant TVC adjustments for the advance payment of the Initial Payment thus failed to give effect to the parties’ intent as expressed in their contract and is reversible error. *See Shaw Grp.*, 322 F.3d at 121-24.

B. The District Court Erred in Denying DCC a TVC Adjustment for Its \$18.4 Million Pre-Effective Date Payment for Class 6D Claims

Under Section 2.10(c) of the FPA, DCC’s payments to the Class 6D Fund established to pay Australia Breast Implant Settlement Option claims within 90 days after the Effective Date

shall be deducted from the next payment due from Dow Corning under this Agreement, and Dow Corning shall receive appropriate credit, ***including an NPV adjustment in its funding obligation in this Funding Payment Agreement.*** Payments made by Dow Corning directly to the . . . 6D Fund[] shall thereafter be credited against the amounts due under this Agreement in the Funding Period in which such payments are made.

RE #714-5, FPA, pp. 11-12, § 2.10(c) (emphasis added). DCC paid \$18.4 million prior to the Effective Date to settle Class 6D claims. Accordingly, it sought an “NPV adjustment in its funding obligation” for this payment under Section 2.10(c), which it made when there was no unfunded Annual Payment Ceiling and, indeed, before the start of the first Funding Period. *Id.*

The district court held that

nothing in the Plan or the FPA . . . authorizes Time Value Credit for [this] Advance Payment[]. Section 2.10 does not refer to Time Value Credits. Section 2.10 only allows Dow Corning credit for payments to Class 6A-6D Funds. Unless specifically addressed in the FPA, Dow Corning is not entitled to Time Value Credits on the Class 6D Payments.

RE #836, 11/28/11 Order, p. 10. The district court was correct that Section 2.10 does not use the phrase “Time Value Credit.” It was incorrect, however, in concluding that, as a result, the FPA does not authorize an adjustment for this advance payment. The FPA requires adjustment to give effect to the net present value funding cap, and whether that adjustment is termed Time Value Credit or NPV adjustment is immaterial. By ignoring both the Plan’s general funding mandate and the explicit requirement of FPA Section 2.10, the district court

violated New York principles of contract construction. It failed to give effect to the parties' overarching intent, *see, e.g., Adams*, 433 F.3d at 228; *Brad H.*, 951 N.E.2d at 748, and to give the words in the agreement a “sensible meaning,” *Riverside S.*, 920 N.E.2d at 363 (citation omitted).

To compound the error, the district court failed to recognize that the Class 6D payment was made with pre-Effective Date Insurance Proceeds. RE #714-3, Hinton Declaration, Att. B, n.2.²⁶ The district court recognized that DCC is entitled to Time Value Credits for pre-Effective Date Insurance Proceeds, but inexplicably declined to grant such credit with respect to this payment. RE #836, 11/28/11 Order, pp. 10, 12. There is no logical reason for this conclusion.

The district court's failure to give effect to the clear intent of the funding program, the FPA's express requirements to adjust the Annual Payment Ceilings to maintain the net present value funding cap, and the express provision for a credit adjustment for the advance payment of Class 6D claims is reversible error.

C. The District Court Erred in Denying a TVC Adjustment for Post-Effective Date Insurance Proceeds Paid After Funding Period 2

Section 2.02(d) of the FPA expressly provides that “[i]n any Funding Period after Funding Period 2,” the amount by which cash and Insurance Proceeds

²⁶ The \$211,456,278 in pre-Effective Date Insurance Proceeds discussed below does not include the \$18.4 million that DCC's insurer paid to settle the Class 6D claims. RE #714-3, Hinton Declaration, Att. B.

received by the Trust exceed the applicable adjusted Annual Payment Ceiling is to be “credited against the Annual Payment Ceiling in the next Funding Period(s), together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of the excess by the Settlement Facility until the beginning of the next Funding Period.” RE #714-5, FPA, p. 7, § 2.02(d). DCC paid \$57,736,990 in Insurance Proceeds in Funding Period 3, when the Annual Payment Ceiling was fully funded. Accordingly, it sought to have the excess, with a TVC adjustment, credited against succeeding Annual Payment Ceilings until fully applied.

The district court correctly recognized, citing Section 2.02(d) of the FPA, that “*after Funding Period 2, Dow Corning is entitled to Time Value Credit on any cash and Insurance Proceeds received by the Settlement Facility exceeding that Funding Period Annual Payment Ceiling*” at the 7% rate. RE #836, 11/28/11 Order, p. 14. It nonetheless held exactly the opposite, i.e., that DCC is “*not* entitled to Time Value Credit for Insurance Proceeds in Funding Period 3.” *Id.*, p. 15 (emphasis added).

The district court reasoned that “the FPA only addresses [i.e., permits a Time Value Credit for] Excess Insurance Proceeds as to Funding Periods 1 and 2 [and] *[t]here are no other provisions in the FPA addressing Funding Period 3.*” *Id.* (emphasis added). The district court’s reasoning is doubly mistaken. First, the provisions in Section 2.03(a) of the FPA for a TVC adjustment for Excess

Insurance Proceeds received during Funding Periods 1 and 2 have no limiting or exclusionary effect on Insurance Proceeds received after Funding Period 2, which are expressly excluded from the FPA's definition of Excess Insurance Proceeds.²⁷ Second, Section 2.02(d) of the FPA expressly prescribes a Time Value Credit for Insurance Proceeds exceeding the Annual Payment Ceiling in any period after Funding Period 2. Even under the district court's impermissibly limited reading of the FPA, such credit is required. As noted above, the district court acknowledged this provision, yet inexplicably failed to apply it.

The district court's denial of TVC adjustments for Insurance Proceeds received in Funding Period 3 in excess of that period's Annual Payment Ceiling is plain error. Section 2.02(d) of the FPA expressly requires that such an adjustment be made to each succeeding Annual Payment Ceiling until fully applied.

Moreover, even absent an express provision, the Plan's absolute funding cap and the true-up provisions of the FPA require the credit adjustment in order to give effect to the parties' overarching intent, as required by New York law. *See, e.g., Adams*, 433 F.3d at 228; *Brad H.*, 951 N.E.2d at 748; *Riverside S.*, 920 N.E.2d at 363.

²⁷ The FPA defines Excess Insurance Proceeds as Insurance Proceeds received after the Effective Date of the Plan but **before** the end of Funding Period 2. RE #714-5, FPA, pp. 7-8, § 2.03(a).

D. The District Court Erred in Limiting DCC's TVC Adjustment for Pre-Effective Date Insurance Proceeds to the Start of Funding Period 1

Section 2.01(a)(ii) of the FPA required DCC to pay Insurance Proceeds it received before the Effective Date to the Trust within 90 days after the Effective Date. RE #714-5, FPA, p. 4, § 2.01(a)(ii). DCC paid \$211,456,278 in pre-Effective Date Insurance Proceeds to the Trust in June 2004, after the Effective Date but before the 90-day deadline for payment and more than nine months before the first scheduled funding of an Annual Payment Ceiling. This payment was in excess of the Annual Payment Ceilings for both Funding Period 1 (\$47 million) and Funding Period 2 (\$103 million).

Section 2.01(a)(ii) of the FPA provides that pre-Effective Date Insurance Proceeds are to be

credited against the Annual Payment Ceiling for Funding Period 1, together with a Time Value Credit calculated at the rate of 7% per annum from the date of receipt of such excess by the Settlement Facility until the beginning of Funding Period 1. To the extent the amount to be credited (including the Time Value Credit) exceeds the Annual Payment Ceiling for Funding Period 1, such excess shall be credited against the Annual Payment Ceiling for Funding Period 2.

Id. In its Motion, DCC sought a credit and Time Value Credit for this payment for Funding Period 1, Funding Period 2, and successive Funding Periods until the amount in excess of each successive Annual Payment Ceiling (including the Time

Value Credit) was exhausted, thus preserving the aggregate net present value funding cap.

The district court held that DCC was entitled to a Time Value Credit on these Insurance Proceeds “only until the beginning of Funding Period 1.” RE #836, 11/28/11 Order, p. 12. Despite its recognition that DCC was entitled to a credit against the Annual Payment Ceiling in Funding Period 2 for the amount by which Funding Period 1’s Payment Ceiling was exceeded, it denied DCC any TVC adjustment on that excess after Funding Period 1.

When read in light of the net present value funding cap and the true-up provisions of the FPA, as it must, *see, e.g., Adams*, 433 F.3d at 228; *Riverside S.*, 920 N.E.2d at 363, Section 2.01(a)(ii) unambiguously calls for a TVC adjustment on any payment in excess of Funding Period 1’s Annual Payment Ceiling, which excess must be applied to reduce Funding Period 2’s Annual Payment Ceiling (and for any amount in excess of Funding Period 2’s Annual Payment Ceiling similarly to roll forward with a TVC adjustment).

In addition, the district court’s construction creates an absurd result at odds with the Plan’s net present value funding cap: that is, accepting the district court’s construction of Section 2.01(a)(ii), the FPA would provide TVC adjustments for *all* Insurance Proceeds for *every* Funding Period until those proceeds and adjustments are applied to subsequent Annual Payment Ceilings *except for* pre-

Effective Date Insurance Proceeds in excess of Funding Period 1's Annual Payment Ceiling. *See* RE #714-5, FPA, pp. 7-8, §§ 2.03(a), 2.03(b) (Excess Insurance Proceeds); *id.*, p. 7, § 2.02(d) (Insurance Proceeds received after Funding Period 2).²⁸ If the district court's construction of Section 2.01(a)(ii) is affirmed, the only insurance receipts in excess of any Annual Payment Ceiling that would not carry forward with TVC adjustments would be pre-Effective Date Insurance Proceeds after Funding Period 1. There is no rational basis for this supposed exception, the imposition of which makes it impossible to maintain the net present value funding cap.

²⁸ This analysis assumes that the district court's denial of TVC adjustments for Insurance Proceeds paid in Funding Period 3 is found to be plain error.

The district court correctly held that DCC is entitled to Time Value Credits for its payment of \$214,363,369 in Excess Insurance Proceeds. RE #836, 11/28/11 Order, pp. 13-15. However, its statement that credit for this amount, along with Time Value Credits, is to be made "proportionally" against Annual Payment Ceilings in each of Funding Periods 5 through 8 is imprecise. *See id.*, pp. 14-15. The language of Section 2.03(b) of the SFA is clear: half of these proceeds plus Time Value Credit of 7% are to be applied against Funding Period 5's Annual Payment Ceiling, 30% plus Time Value Credit of 7% are to be applied against Funding Period 6's Annual Payment Ceiling, and 10% plus Time Value Credits of 7% are to be applied against each of Funding Period 7 and 8's Annual Payment Ceilings. RE #714-5, FPA, p. 8, § 2.03(b). Section 2.03(b) further provides that, to the extent these credits exceed the applicable Annual Payment Ceiling, the excess is to be rolled forward and applied against succeeding Annual Payment Ceilings, along with Time Value Credits, until fully applied. *Id.* This Court should hold that the district court's use of the word "proportionally" is to be applied in accordance with the percentages specified in Section 2.03(b) of the FPA and DCC's construction of this provision.

E. The District Court Erred in Denying TVC Adjustments for DCC's Payments of \$2.9 Million for Settlement Facility Access to MDL 926 Claims Office Materials, \$2,180,656 from DCC's MDL 926 Escrow Account, and \$7.2 Million to Class 4A Claimants

Section 3.02(a)(ii) of the Settlement Facility and Fund Distribution Agreement (“SFA”) provides that if DCC directly pays any Class 4A (Prepetition Judgment) claims, those amounts shall be offset against the amounts DCC is required to pay under the FPA. RE #714-7, SFA, p. 4, § 3.02(a)(ii).²⁹ In June 2004, DCC paid \$7.2 million to settle Class 4A claims.

Further, on June 10, 2004, DCC paid \$2.9 million on behalf of the Trust for the Settlement Facility's pre-Effective Date access to MDL 926 Claims Office materials. Also, on June 10, 2004, DCC paid \$2,176,572.05 in cash to the Trust, and on September 8, 2004, it paid an additional \$4,084 in cash to the Trust from its MDL escrow account. *See* RE #714-3, Hinton Declaration, Att. B, n.6; RE #714-19, 5/27/04 Letter from D. Greenspan to E. Gentle. All of these payments predated the start of the first annual Funding Period (i.e., the first anniversary of the

²⁹ DCC made this payment pursuant to the February 15, 2001 Agreement and Order Approving Agreement to Arbitrate Regarding Dow Corning Settlement Facility Access to MDL 926 Claims Office Materials, to which the TCC was a party, and the subsequent arbitration award. *See* RE #714-3, Hinton Declaration, Att. B, n.5; RE #714-19, 5/27/04 Greenspan Letter to Gentle. The agreement provided for the Settlement Facility to pay any award.

Effective Date) and, therefore, were made before there was any outstanding Annual Payment Ceiling.

The district court denied TVC adjustments for these advance payments because “the parties did not expressly provide for any.” RE #836, 11/28/11 Order, p. 13. It refused to “read into the FPA . . . the requirement to calculate Time Value Credits” on these advance payments. *Id.*

The district court got it exactly backward. The district court did not need to “read” any requirement into the FPA because the FPA already expressed the clear intent and requirement to protect the inviolable net present value funding cap by adjusting the “starting point” Annual Payment Ceilings to reflect the actual timing and amount of payments. Absent an express exception, the overarching funding cap and true-up provisions of the FPA govern and require TVC adjustments for these payments. The district court’s holding to the contrary is reversible error.

CONCLUSION

For the foregoing reasons, Dow Corning Corporation respectfully requests that the Court reverse the Order of the district court and hold that Dow Corning Corporation is entitled to all the TVC adjustments it seeks.

Dated: May 10, 2012

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 11,857 words.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2012, I electronically filed a copy of the foregoing Brief of Appellant Dow Corning Corporation 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 (99-0005)**

RE #

- 714 1/8/10 Dow Corning Corporation's Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents and Memorandum in Support of Dow Corning Corporation's Time Value Credit Motion.
- 714-3 1/8/10 Declaration of Paul J. Hinton
- 714-4 6/1/04 Amended Joint Plan of Reorganization
- 714-5 Funding Payment Agreement (as amended as of June 1, 2004)
- 714-6 Dow Corning Qualified Settlement Trust Fund Month Ended September 30, 2009 Report of the Financial Advisor (Filed Under Seal)
- 714-7 6/1/04 Settlement Facility and Fund Distribution Agreement
- 714-16 6/1/04 Second Amended and Restated Depository Trust Agreement
- 714-19 5/27/04 Letter from D. Greenspan to E. Gentle
- 731 2/12/10 Response to Dow Corning Corporation's Motion to Enforce Application of Time Value Credits
- 736 3/2/10 Reply in Support of Dow Corning Corporation's Time Value Credit Motion
- 836 11/28/11 Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents
- 841 12/20/11 Notice of Appeal
- 879 3/11/10 Oral Argument Transcript