UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

DOW CORNING CORPORATION'S MOTION TO ENFORCE APPLICATION OF TIME VALUE CREDITS UNDER THE AMENDED JOINT PLAN OF REORGANIZATION AND RELATED DOCUMENTS

Dow Corning Corporation ("Dow Corning" or "DCC") respectfully submits this Motion seeking an Order enforcing the terms of the Amended Joint Plan of Reorganization, dated February 4, 1999 (as updated June 1, 2004, the "Plan"), the Funding Payment Agreement (as amended as of June 1, 2004, the "FPA") and related documents, and, as required by the Plan, confirming that DCC entitled to receive credits, and Time Value Credits calculated at an interest rate of 7% per annum, compounded annually, against its annual Plan funding obligations for certain pre-Effective Date and other funding payments it has made through September 30, 2009, in accordance with the methodology set forth in the Declaration of Paul J. Hinton, attached as Exhibit 1 hereto.[1] Confirmation that DCC is entitled to receive these credits is necessary to ensure that the Plan's $2.35 billion Net Present Value ("NPV") payment cap is honored and DCC does not exceed that Plan-specified maximum payment obligation. Confirmation also is necessary to protect DCC from excessive Annual Payment Ceilings that contravene the Plan's payment cap.

[1] Unless otherwise defined, capitalized terms herein shall have the meanings provided in the Plan and the FPA. The Plan is Exhibit 2 hereto, and the FPA is Exhibit 3. The remaining Exhibits, cited in Dow Corning's accompanying Memorandum, also are submitted in support of this Motion.

There are eight categories of payments at issue (collectively, the "Advance Payments"):

1. The $985,000,000 Initial Payment, most of which was paid in several installments in 2001, several years before the June 1, 2004 Effective Date of the Plan, with one additional pre-Effective Date installment in May 2004;

2. The $18,400,000 paid (via insurance proceeds) to settle Class 6D Claims (Australian Breast Implant Settlement Claims) on April 3, 2001, several years before the Effective Date of the Plan;

3. The $211,456,278 in insurance proceeds received prior to the Effective Date of the Plan and paid to the Depository Trust in June 2004, after the Effective Date of the Plan but before the 90-day Plan deadline for payment and in an amount that exceeded the Annual Payment Ceilings for Funding Periods 1 and 2;

4. The $2,900,000 paid to the MDL 926 Settlement Fund in June 2004 on behalf of the Settlement Facility for access to and use of MDL 926 Claims Office Materials;

5. The $2,180,656 in cash paid from DCC's MDL 926 escrow account in June and September 2004, after the Effective Date of the Plan but before any payment obligation was due, so that approved claims and authorized expenses could be paid;

6. The $7,200,000 paid on June 10, 2004, after the Effective Date of the Plan, for immediate distribution to Class 4A (Prepetition Judgment Claims) claimants;

7. The $214,363,369 in Excess Insurance Proceeds paid to the Depository Trust after the Effective Date of the Plan; and

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

All of these payments generate Time Value Credits totaling $370,087,085 for payments through September 30, 2009, because they were made in advance of the schedule of annual payments set forth in the FPA. Confirmation that DCC is entitled to receive credits and Time Value Credits for these payments is necessary to ensure that the Plan's $2.35 billion Net Present Value ("NPV") payment cap is honored, and that DCC is protected from having to pay more than this aggregate payment maximum or more than the annual payment maximums prescribed by the

FPA (the "Annual Payment Ceilings"). The Claims Administrator should be directed to adjust the Annual Payment Ceilings accordingly.

The grounds for this Motion are set forth in detail in the accompanying Memorandum in Support.

Counsel for DCC and the Claimants' Advisory Committee have met and conferred with respect to this Motion. DCC's counsel has explained the nature of the relief sought and its basis in correspondence, and requested, but did not obtain, concurrence in the relief sought.

A proposed Order is attached hereto.

Dated: January 8, 2010

Respectfully submitted,

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DEBTOR'S REPRESENTATIVE
AND ATTORNEY FOR DOW CORNING
CORPORATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF
DOW CORNING CORPORATION'S TIME VALUE CREDIT MOTION

Dow Corning Corporation ("Dow Corning" or "DCC") respectfully submits this Memorandum in support of its Time Value Credit Motion, requesting the Court to enforce the terms of the Amended Joint Plan of Reorganization, dated February 4, 1999 (as updated June 1, 2004 (Ex. 2, the "Plan")), the Funding Payment Agreement (as amended as of June 1, 2004 (Ex. 3, the "FPA")) and related documents, and, as required by the Plan, confirm that DCC is entitled to receive credits and Time Value Credits (as defined below) against its annual Plan funding obligations for certain of its pre-Effective Date and other funding payments through September 30, 2009.[1] DCC further requests that the Court approve the methodology to be used in calculating these credits, which results in a total Time Value Credit of $370,087,085 for funding payments made through September 30, 2009. *See* Ex. 1 (Declaration of Paul J. Hinton ("Hinton Declaration")), Att. E.

There are eight categories of payments at issue (collectively, the "Advance Payments"):

1. The $985,000,000 Initial Payment, more than 99% of which was paid in several installments in 2001, several years before the June 1, 2004 Effective Date of the Plan, with one additional pre-Effective Date installment in May 2004;

2. The $18,400,000 paid (via insurance proceeds) to settle Class 6D Claims (Australian Breast Implant Settlement Claims) on April 3, 2001, several years before the Effective Date of the Plan;

[1] "Time Value Credit Motion" means Dow Corning's *Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents*, which will be referred to herein as the "Motion." Unless otherwise defined, capitalized terms in this Memorandum shall have the meanings provided in the Plan and the FPA.

3. The $211,456, 278 in insurance proceeds received prior to the Effective Date of the Plan and paid to the Depository Trust in June 2004, after the Effective Date of the Plan but before the 90-day Plan deadline for payment and in an amount that exceeded the Annual Payment Ceilings (as defined below) for Funding Periods 1 and 2;[2]

4. The $2,900,000 paid from DCC's MDL 926 escrow account to the MDL 926 Settlement Fund in June 2004 on behalf of the Settlement Facility Dow Corning Trust ("Settlement Facility") for access to and use of MDL 926 Claims Office Materials;

5. The $2,180,656 in cash paid from DCC's MDL 926 escrow account in June and September 2004, after the Effective Date of the Plan but before any payment obligation was due, so that approved claims and authorized expenses could be paid;

6. The $7,200,000 paid on June 10, 2004, after the Effective Date of the Plan, for immediate distribution to Class 4A (Prepetition Judgment Claims) claimants;

7. The $214,363,369 in Excess Insurance Proceeds paid to the Depository Trust after the Effective Date of the Plan; and

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

All of these payments generate a Time Value Credit because they were made in advance of the funding obligations required by the FPA. Confirmation that DCC is entitled to receive credits and Time Value Credits for these payments is necessary to ensure that the Plan's $2.35 billion Net Present Value ("NPV") payment cap is honored, and that DCC is protected from having to pay more than this aggregate payment maximum or more than the annual payment maximums prescribed by the FPA after appropriate adjustments (the "Annual Payment Ceilings"). These credits and Time Value Credits are required by the Plan, but nonetheless are disputed at least in part by the Claimants' Advisory Committee ("CAC"). If these Time Value Credits are not applied to adjust the payment obligations as described herein, the aggregate cap would increase from $2.35 billion NPV (the limit set by the Plan) to $2.64 billion NPV. Ex. 1, ¶ 33.

[2] Each Funding Period, as defined in the FPA, consists of a 12-month period beginning on the first anniversary of the Effective Date. Ex. 3 (FPA) § 2.01(b). For example, Funding Period 0 began on the June 1, 2004 Effective Date and ended on May 31, 2005, and Funding Period 1 began on June 1, 2005 and ended on May 31, 2006.

INTRODUCTION

The Plan requires DCC to make payments to or for the benefit of the Depository Trust up to certain Annual Payment Ceilings and a total aggregate sum "with a Net Present Value as of the Effective Date of $2.35 billion." Ex. 2 (Plan) § 5.3.[3] The FPA makes clear that the NPV of these payments in the aggregate, measured as of the Effective Date, "[i]n no event" shall exceed $2.35 billion. Ex. 3 (FPA) § 2.01.[4] Because the Plan and FPA contemplated that DCC and/or its insurers would make payments in advance of their due date, or that payments might be postponed for reasons permitted by the Plan, the FPA requires adjustments to be made to the Annual Payment Ceilings to ensure that DCC is obligated to pay up to but not more than the $2.35 billion NPV funding cap. To maintain the NPV cap as of the Effective Date, the Annual Payment Ceilings must be increased or decreased to take into account the timing of payments. *See* Ex. 1.

As of September 30, 2009, DCC had paid more than $1.636 billion directly to the Settlement Facility.[5] In addition, DCC, through one of its insurance carriers, paid $18.4 million

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[3] The Annual Payment Ceilings are set forth at Section 2.01(b) of the FPA (Ex. 3). They are nominal values timed to have a Net Present Value of $2.35 billion as of the Effective Date of the Plan when coupled with the Initial Payment if they are paid on the first day of each Funding Period and if the Initial Payment is paid on the Effective Date. Net present value, "a term that reflects the time value of money, the common notion that $10 paid today is worth more than $10 paid a year from today," is a concept common in bankruptcy law. 7 Collier on Bankruptcy ¶ 1129.06(1)(a) (15th ed. Rev. 2009). The Plan defines Net Present Value as

> the value of an amount of money to be paid in the future or over a period of time that has been adjusted or discounted to reflect that amount as of a single earlier date. When used in this Plan, the discount rate for calculating Net Present Value is 7% compounded annually; and the date used for such adjustment is the Effective Date. [Ex. 2 (Plan) § 1.102.]

[4] The Plan exempts from the computation of the total capped payment interest (the "Exempted Interest") that actually had accrued on $905 million of the Initial Payment, and so is not included in the calculation of the NPV of $2.35 billion or applied toward any Annual Payment Ceiling. *See* Ex. 3 (FPA) § 2.01(a).

[5] $1,636,704,500 was paid to the Depository Trust by or on behalf of Dow Corning, of which $92,908,572 was Exempted Interest and $488,032 was the value of fixed assets transferred from the MDL. *See* Ex. 1, Att. B, C; Ex. 4 (Dow Corning Qualified Settlement Trust Fund Month Ended September 30, 2009 Report of the Financial Advisor).

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directly to the trustee in Australia for distribution to Class 6D (Australian Breast Implant Settlement Claims) claimants in conjunction with the resolution of a coverage dispute; and DCC paid $7.2 million to resolve Class 4A claims pursuant to the Bankruptcy Court's Orders dated September 30, 1999 and February 3, 2000, and Sections 2.08 of the FPA and 3.02(a)(ii) of the Settlement Facility and Fund Distribution Agreement ("SFA") (Ex. 5), and paid $2.9 million to the MDL on behalf of the Settlement Facility for use of the MDL Materials, bringing the total payment to $1,665.2 billion, or $1.572 billion after excluding the payment of Exempted Interest and the value of fixed assets transferred from the MDL.

In nominal dollars, a total of $1,499,237,294, *i.e.*, more than 95% of the $1.572 billion, was paid in advance of the due dates contemplated in the Plan and the FPA. Specifically, DCC: (1) paid the $985 million Initial Payment in advance of the Plan's June 1, 2004 Effective Date; (2) funded the $18.4 million Class 6D settlement several years before the Effective Date; (3) transferred certain Insurance Proceeds totaling $211,456,278 to the Settlement Facility in advance of the due date for such payment; (4) paid $2.9 million in June 2004 to the MDL 926 Settlement Fund on behalf of the Settlement Facility; (5) made additional cash payments totaling $2,180,656 from the MDL 926 Escrow Account in advance of any funding request; (6) paid the $7.2 million Class 4A payment during Funding Period 0 when the applicable Annual Payment Ceiling had been exceeded; (7) transferred $214,363,369 in Excess Insurance Proceeds to the Settlement Facility, which were in excess of the Annual Payment Ceilings for the relevant Funding Periods; and (8) transferred $57,736,990 in regular insurance proceeds in excess of the applicable adjusted Payment Ceiling during Funding Period 3. The total of these Advance Payments, when their associated Time Value Credits are taken into account, exceeds the Initial Payment plus the aggregate Annual Payment Ceilings through Funding Period 3. DCC, in short, exceeded its funding obligation and is entitled to Time Value Credits with respect to all of the Advance Payments by virtue of the timing of those payments.[6]

DCC's attempts to resolve its differences with the CAC have been unsuccessful. Accordingly, to ensure that DCC's funding obligations do not exceed the Plan's $2.35 billion NPV funding cap, DCC seeks an Order confirming that it is entitled to receive credits against the funding cap and Time Value Credits for the payments set forth above, and further approving the correctness of its calculation of all credits applicable to each of these payments and the resulting adjustments to the Annual Payment Ceilings as required by the Plan and the FPA.

I. FACTUAL BACKGROUND

A. Plan Requirements

The immutable, overarching principle governing DCC's financial obligation under the Plan is that it is to pay no more than $2.35 billion NPV to resolve (1) all tort claims (Classes 5-10), (2) claims in Classes 4A and 11-17, and (3) all associated administrative costs. The Plan and Plan Documents are replete with provisions that establish and ensure this absolute NPV payment limit. For example, the Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization (February 4, 1999) ("Disclosure Statement") (Ex. 6) explains that the anticipated nominal payment stream, which totals $3.172 billion, is "subject to adjustment to maintain an NPV as of the Effective Date of $2.35 billion. This amount constitutes a 'cap' on the funding to be provided by Dow Corning." *Id.* at 1.1E.

The FPA is to the same effect. It obligates DCC to make payments over at least 16 annual funding periods if and as necessary to pay the allowed amount of eligible claims. The Annual Payment Ceilings in the FPA define the maximum amount (in nominal dollars) that DCC

[6] Because Dow Corning satisfied the Annual Payment Ceilings through Funding Period 3 in advance of their due dates, payments to the Depository Trust through Funding Period 3 are properly characterized as Advance Payments, or "accelerated" or "early" payments.

would have to pay annually to achieve the $2.35 billion NPV cap, ***assuming*** that the Initial Payment was made on the Effective Date and that each of the 16 annual payments occurred once each year on the anniversary of the Effective Date and not before. DCC, however, ***did*** make payments prior to the Effective Date, and subsequent payments have not been, will not be and cannot be made precisely on each anniversary of the Effective Date. Funding occurs throughout each year as insurance proceeds are received, and if and when the Settlement Facility requests funding to pay approved claims and authorized expenses. *See* Ex. 3 (FPA) §§ 2.01(a), 2.02.

To ensure that the $2.35 billion NPV cap is not exceeded despite the varying payment schedule, the FPA affirms that, "***In no event*** shall Dow Corning be required to fund (whether with Insurance Proceeds or cash) an amount in excess of a net present value of $2,350,000,000 discounted at the rate of 7% per annum to the Effective Date." *Id.* (FPA) § 2.01 (emphasis added). Accordingly, the FPA requires the Claims Administrator to revise the Annual Payment Ceilings to ensure that the payment obligations do not exceed the cap. Specifically, each time a payment is made to the Settlement Facility, the Annual Payment Ceilings must be re-calculated to maintain a schedule of payment obligations that does not exceed the $2.35 billion NPV cap. This re-calculation is triggered both by early and deferred payment. Thus, if DCC makes an early payment, future Annual Payment Ceilings must be reduced to give credit (a "Time Value Credit") for the early payment at 7% per annum from the date of receipt, compounded annually. Conversely, if the Settlement Facility does not need cash, DCC's obligation for that year rolls forward to the next year, and the Annual Payment Ceiling for that next year is increased to account for the deferred unpaid amount plus 7% per annum compounded annually on that amount until paid. DCC's payment obligation in nominal dollars thus must be increased or decreased as necessary to ensure that DCC does not, by virtue of the fortuity of the claim flow, pay less or more than the aggregate or annual amounts required by the terms of the Plan. *See id.* (FPA) §§ 2.01, 2.02, 2.05.

With one exception, the credits and Time Value Credits associated with payments that exceed any Annual Payment Ceiling are applied to reduce the next Annual Payment Ceiling. *Id.* (FPA) § 2.02(d). This exception applies to insurance proceeds received during the first two years after the Effective Date (the "Excess Insurance Proceeds"). *See id.* (FPA) § 2.03. Excess Insurance Proceeds are to be credited, not against the immediately succeeding Annual Payment Ceiling, but, rather, against the Annual Payment Ceilings in Funding Periods 5-8, including a Time Value Credit computed at 7% per annum compounded annually from the date of receipt until the date the proceeds are credited. This deferred credit was incorporated in the FPA to ensure sufficient funding in the initial years of the implementation of the Plan, when a substantial percentage of the claims were expected to be filed.

B. <u>Procedural History</u>

On October 21, 2004, DCC requested the Claims Administrator to adjust the Annual Payment Ceilings for Funding Periods 1-3 and Funding Periods 5-8 as required by the FPA, by crediting the Ceilings with certain of DCC's Advance Payments and Time Value Credits in accordance with Sections 2.01(a), 2.03 and 2.05 of the FPA. Ex. 7.[7] On November 10, 2004, the CAC objected to certain components of DCC's request. Ex. 8. Under the FPA, the Claims Administrator is required to respond to a request to adjust an Annual Payment Ceiling within 30 days; any party then may file an objection to the Claims Administrator's determination. *See* Ex. 3 (FPA) §§ 2.05(b), (c). The Claims Administrator, however, did not respond substantively to DCC's request, *see* Ex. 9, and the parties subsequently requested that she defer a substantive response while they attempted to resolve their differences, *see* Exs. 10-11.

The CAC and the Debtor's Representatives had various but ultimately unsuccessful discussions regarding these issues. On May 10, 2006, the Debtor's Representatives proposed

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[7] This request did not address the funding of the Class 6D settlement, the Class 4A payments or the MDL payments.

that the parties mediate their dispute and suggested several potential mediators. The CAC did not respond. On March 5, 2008, the Debtor's Representatives again requested that the Claims Administrator adjust the Annual Payment Ceilings as required by the FPA to account for the Advance Payments. Ex. 12. On April 8, 2008, the CAC again objected to the Debtor's Representatives' position and argued that it would be premature to calculate adjustments to the Annual Payment Ceilings before the end of Funding Period 4, *i.e.*, prior to June 1, 2008. Ex. 13.

On July 30, 2008, the Claims Administrator issued a memorandum outlining his understanding of the parties' positions and areas of agreement and disagreement. Since that time, the parties have been unable to resolve the dispute. Accordingly, because the Finance Committee and DCC require certainty regarding payment obligations, DCC has filed the Time Value Credit Motion and this Memorandum.

II. DCC IS ENTITLED TO TIME VALUE CREDITS FOR ALL ADVANCE PAYMENTS

The funding cap in the Plan is absolute and unequivocal: "[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 a rate of 7% per annum to the Effective Date." Ex. 3 (FPA) § 2.01. The NPV of DCC's payments thus is to be calculated ***to the Effective Date,*** and it ***may not exceed $2.35 billion NPV***. This mandate is repeated numerous times in the Plan, the FPA and the Depository Trust Agreement ("DTA") (Ex. 14). *See* Ex. 2 (Plan) § 5.3; Ex. 3 (FPA) §§ 2.01, 2.02(d), 2.03(b), 2.05(a)(ii); Ex. 14 (DTA) § 4.01(c). The applicability of Time Value Credits to accelerated payments made by DCC thus is required by clear, consistent and mandatory language appearing throughout the Plan and Plan-related documents.

A. This Court Has Jurisdiction Over And Should Resolve This Dispute

Whether DCC is entitled to Time Value Credit adjustments for accelerated funding of certain of its payment obligations, and the application of those adjustments, present fundamental issues of Plan interpretation. Under Section 3.01 of Exhibit A to the Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan (dated June 10, 2004) and Section 4.09(c) of the SFA, DCC and the CAC may move the Court for an interpretation of Plan provisions and resolution of the present dispute. Ex. 11; *see In re Thickstun Bros. Equip. Co.*, 344 B.R. 515, 522 (B.A.P. 6th Cir. 2006) ("[E]ven the most restrictive views of post-confirmation jurisdiction acknowledge that the bankruptcy courts retain jurisdiction to interpret and enforce confirmed plans of reorganization.").

B. Governing Principles Of Contract Construction

New York law requires a court to give effect to the parties' intent as expressed in a contract. *See Shaw Group Inc. v. Triplefine Intern. Corp.*, 322 F.3d 115, 121 (2d Cir. 2003).[8] It also requires a contract to be construed to give effect to all of its provisions and to avoid rendering any term meaningless. *See Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992); *Datron Inc. v. CRA Holdings*, 42 F. Supp. 2d 736, 741 (W.D. Mich. 1999) (applying New York law).

C. To Ensure That DCC's Maximum Payment Obligation Of $2.35 Billion NPV Is Not Exceeded, The Plan Requires Annual Payment Ceilings To Be Adjusted By Giving Time Value Credits For Advance Payments

The FPA requires that DCC be given a 7% Time Value Credit for the Advance Payments. Section 2.01 of the FPA defines DCC's payment obligation under the Plan, as follows:

> Dow Corning agrees, subject to the terms hereof, 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. ***In no event shall Dow Corning be required to fund (whether with Insurance Proceeds or cash) an amount in excess of a net present value of $2,350,000,000 discounted at the rate of 7% per annum to the Effective Date***. [Ex. 3 (FPA) (emphasis added).]

[8] The Plan Documents provide that they shall be governed by and construed in accordance with New York law. Ex. 2 (Plan) § 6.13; Ex. 3 (FPA) § 5.08; Ex. 14 (DTA) § 7.10.

The meaning and intent of this unambiguous provision are unmistakable: DCC cannot be required to pay more than $2.35 billion NPV, computed as of the Effective Date. *Id.* (FPA) § 2.01, *see also* Ex. 2 (Plan) § 5.3. Enforcement of this fixed, immutable cap is the touchstone of the Plan. It was established as the result of extensive, contentious negotiations between the Tort Claimants' Committee ("TCC") and the Debtor, following which it was overwhelmingly approved by a vote of claimants, the Bankruptcy Court and this Court.

The Annual Payment Ceilings in the FPA presume that the Initial Payment would be made on the Effective Date, and that additional payments would be made once each year on the anniversary of the Effective Date.[9] The ceilings are set to yield an aggregate maximum of $2.35 billion NPV when the Initial Payment is made on the Effective Date and the Annual Payment Ceilings are adjusted to present value as of the Effective Date at the rate prescribed in the Plan. The parties understood, however, that in reality payments would and could not be made on this strict schedule, and thus the FPA contemplates adjustments to account for the actual timing of funding payments and obligates the Claims Administrator to adjust the Annual Payment Ceilings to account for the actual timing of payments in order to maintain the total NPV of the payment stream. *See* Ex. 3 (FPA) § 2.05. This obligation applies to all payments, whether pre- or post-Effective Date. *See generally id.* (FPA) §§ 2.01, 2.02.

The sole exception to this obligation to adjust Annual Payment Ceilings is the Exempted Interest, which the FPA specifies is not to be included in calculating the NPV of the aggregate cap or applied toward any Annual Payment Ceiling. *Id.* (FPA), § 2.01(a). Under the well-settled

[9] The Plan as confirmed incorporated the original version of the FPA (the "Original FPA") (Ex. 15). Section 2.01(a) of the Original FPA in fact specified that the Initial Payment be made ***on*** the Effective Date. *See id.* (FPA), § 2.01(a) ("On the Effective Date, Dow Corning will make an initial payment of $985,000,000 to the Settlement Facility.") The TCC, however, insisted that the Initial Payment be paid before the Effective Date. Dow Corning made the Initial Payment in several installments in 2001 and one additional installment in 2004. The FPA was then modified to acknowledge this accelerated funding of the Initial Payment.

principle of contract construction *expressio unius est exclusio alterius*, recognizing this specific exception means that the FPA must be read to exclude any other exceptions. *See In re Dow Corning Corp.*, 113 F.3d 565, 569 (6th Cir. 1997); *Silver v. Pataki*, 769 N.Y.S.2d 518, 523 (N.Y. App. Div. 2003).

To ensure compliance with the aggregate funding cap, credits and adjustments must be applied to all payments (other than the Exempted Interest), until those payments are fully credited against the Initial Payment obligation and the Annual Payment Ceilings. This is so regardless of whether the payments were made before or after the Effective Date.

DCC has calculated the Time Value Credits and other adjustments to the Annual Payment Ceilings required as a result of all payments made through September 30, 2009. The payments made by Funding Period, the Time Value Credits and the resulting adjustments to the Annual Payment Ceilings as mandated in the FPA are set forth on Attachment D to the Hinton Declaration (Ex. 1), and are discussed in Section III, *infra*. DCC calculates a Time Value Credit for each Advance Payment until the full amount of the payment and any accrued Time Value Credits have been credited against the Annual Payment Ceilings. Payments are credited as they are received by the Depository Trust or paid directly to the claimants (as in the case of the payment for Classes 6D and 4A) or others (as in the case of the payment to the MDL 926 Settlement Fund), and are applied to the Annual Payment Ceilings in the order received or paid, *i.e.*, using a "FIFO" ("first in, first out") accounting methodology. The end result protects the $2.35 billion NPV cap. By contrast, any calculation that ignores the effect of the Advance Payments on DCC's funding obligations and fails to apply a Time Value Credit that rolls forward against each succeeding Annual Payment Ceiling until it is exhausted will result in the $2.35 NPV billion cap being exceeded, in violation of the Plan's touchstone provision.

Attachment A to the Hinton Declaration illustrates the effect of failing to apply a Time Value Credit for an early payment and, conversely, the effect of failing to add the time value charge for a late or deferred payment, using the $374 million Annual Payment Ceiling for Funding Period 3 as an example. *See* Ex. 1, Att, A. If the $374 million Annual Payment Ceiling were to be paid three years early, *i.e.* on the Effective Date, instead of at the beginning of Funding Period 3, and if there were no Time Value Credit adjustment applied to account for the early payment, then DCC would have overpaid by $68.7 million NPV. Conversely, if DCC were to make the payment 3 years late without adding a time value charge, then it would underpay by $56.1 million NPV. To avoid either deviation, an adjustment must be made to account for the timing of the payment. If a payment is made in advance of the scheduled due date, DCC must receive a Time Value Credit calculated at the rate of 7% per year as of the Effective Date so that it does not overpay. And, if the payment is deferred, then a charge of 7% per year must be added to ensure that DCC's payment obligations are not reduced.

If Time Value Credits are not applied to all early payments, the amounts DCC is required to pay will be accelerated, with the result that the adjusted Annual Payment Ceilings will exceed the Plan's $2.35 billion NPV cap. To avoid this Plan violation, the Claims Administrator should be required to apply the Time Value Credit to all of the Advance Payments as set forth below.

III. TIME VALUE CREDIT COMPUTATION

A. Summary Of Time Value Credit Calculations And Annual Payment Ceiling Adjustments

As shown on Attachment D to the Hinton Declaration, DCC's pre-Effective Date payments (column 3) earned a Time Value Credit of $200.4 million (column 8), resulting in a balance of $1,203.8 million (column 9) ($1,003.4 million + $200.4 million) to be applied against the $985 million Initial Payment. Thus, as of the Effective Date, DCC's payments exceeded the required payment by $218.8 million ($1,203.8 million - $985 million). Additionally, DCC made other payments before Funding Period 1 totaling $319.3 million (column 3), which, together with the balance of the Initial Payment and the associated Time Value Credit in excess of $985 million, earned a TVC of $37.1 million (column 8), thus bringing the total Time Value Credit earned after the Effective Date but before the beginning of Funding Period 1 to $237.5 million (column 8) ($200.4 million + $37.1 million). The portion of the payment that constitutes Excess Insurance Proceeds plus the Time Value Credit on that amount is credited to Funding Periods 5 through 8 as explained below. The remainder of the payments and Time Value Credits are applied to the succeeding Annual Payment Ceilings until fully credited. Column 10 of Attachment D shows the amount applied to each Annual Payment Ceiling. Column 5 shows the sum of the payments made by DCC as of September 30, 2009 plus the remaining Annual Payment Ceilings adjusted to account for the payments and the Time Value Credits as described above. The total shown in Column 5 demonstrates that these adjustments, which credit DCC with a total of $370,087,085 in Time Value Credits for payments through September 30, 2009, *see* Ex. 1, Att. E, are necessary to preserve the total NPV of $2.35 billion that is fixed by the Plan. We address each category of Advance Payment below.

B. <u>Time Value Credits Applicable To Pre-Effective Date Payments</u>

Substantially before the Effective Date, DCC paid over $1 billion to the Settlement Facility for the benefit of claimants. Specifically, DCC paid the full amount of the Initial Payment, defined in the Plan as $985 million, the Exempted Interest and the Class 6D settlement, *i.e.*, $18.4 million. The nominal dollar amount of these payments (excepting the Exempted Interest), must be credited against the payment obligations in the Plan. In addition, the Annual Payment Ceilings must be adjusted to reflect the NPV of these payments (excluding the Exempted Interest) as of the Effective Date.

1. <u>The Initial Payment</u>

The Plan and the FPA define the Initial Payment to the Depository Trust as $985 million. Ex. 2 (Plan) § 7.4; Ex. 3 (FPA) § 2.01(a). Although the funding schedule in the FPA was devised assuming that the Initial Payment would be paid on the Effective Date, as noted above, the TCC demanded that DCC make the payment while appeals of Plan confirmation were pending. As a result, DCC paid the Initial Payment in several installments in 2001 and one additional installment in 2004, nearly all of it ***three years*** before the Effective Date. *See* Ex. 14 (DTA) § 4.01; Ex. 3 (FPA) § 2.01. Had the Initial Payment been made on the Effective Date, as the schedule contemplates, there would have been no need to calculate a Time Value Credit on this payment. Because the TCC achieved pre-Effective Date funding of the entire Initial Payment, however, the proper adjustments must be made.

DTA Section 4.01(c), which documents the pre-Effective Date payment of the Initial Payment, confirms that the acceleration of the Initial Payment does not modify the requirement of calculating NPV as of the Effective Date. *See* Ex. 14 (DTA) § 4.01(c) ("Nothing in this Trust Agreement alters or modifies the manner of calculating the Net Present Value in the Plan as of the Effective Date."). The NPV of the Initial Payment plus the Annual Payment Ceilings equal $2.35 billion only if the Initial Payment is paid ***on*** the Effective Date. Accordingly, because the Initial Payment was paid before the Effective Date, the Plan's absolute $2.35 billion NPV funding cap and the DTA's express adherence to the manner of calculating the NPV funding cap as of the Effective Date dictate that the Annual Payment Ceilings be adjusted to account for the early payment of the Initial Payment so as to ensure compliance with the $2.35 billion NPV cap.[10]

Attachment B to the Hinton Declaration sets forth, *inter alia*, the dates and amounts of the transfers comprising the Initial Payment. Attachment E shows that the Time Value Credit

[10] Had the Initial Payment been paid after the Effective Date, the CAC undoubtedly would have demanded a 7% increase from the Effective Date to the date of payment to maintain the funding stream's NPV. (That is, it would have demanded an increase in the nominal amount of the Initial Payment so that, when discounted at 7% from the date of payment to the Effective Date, the NPV of the entire stream of payments would have equaled $2.35 billion). The same principles must apply to early payment: to maintain the NPV value of the payment stream, the Annual Payment Ceilings must be adjusted to credit DCC for its early payments.

attributable to the accelerated Initial Payment, calculated to the Effective Date applying the Plan's 7% NPV discount rate (Ex. 3 (FPA) § 2.01), is $195,963,844. Because the Initial Payment and associated Time Value Credit (and the Class 6D Payment and associated Time Value Credit discussed below) exhausted the adjusted Annual Payment Ceiling for Funding Period 0, the excess amount must be rolled forward and credited, with Time Value Credits, to successive Annual Payment Ceilings until used up. The total of the Time Value Credits for the Initial Payment equals $231,177,891. *See* Ex. 1, Att. E. Attachment D to the Hinton Declaration reflects the application of these credits and adjustments to the Annual Payment Ceilings that must be made to take into account the NPV of the Initial Payment as of the Effective Date, which is necessary to preserve the $2.35 billion NPV funding cap that is fixed by the Plan. *See* Ex. 14 (DTA) § 4.01(c).

2. The Class 6D Payment

On March 15, 2001, the Bankruptcy Court approved DCC's settlement of disputes with its insurer American International Underwriters ("AIU"), *et al*. The settlement authorized AIU to obtain the contractual commitment of the law firms representing Class 6D registrants to resolve their Class 6D claims in advance of the Effective Date for the sum of $18.4 million, which it did. Ex. 16. On April 3, 2001 AIU paid the agreed sum directly to the trust established in Australia to resolve the Class 6D claims.

The Plan provides that the Settlement Facility shall issue payments for the Canadian and Australian class settlements embodied in the treatment of Classes 6A through 6D and further provides, generally, that DCC shall receive a credit if the amounts due are paid other than by the Settlement Facility. *See* Ex. 3 (FPA) § 2.10. Because the Class 6D payment was made by DCC (via insurance proceeds), it is entitled to a credit for that payment. Additionally, because the Class 6D payment was made before the Effective Date, DCC is entitled to a Time Value Credit computed at the rate of 7% per year from the date of payment to the Effective Date.

As Attachment E to the Hinton Declaration shows, the Time Value Credit attributable to the accelerated Class 6D Payment, calculated to the Effective Date applying the Plan's 7% NPV discount rate, Ex. 3 (FPA) § 2.01, is $4,413,664. Ex. 1, Att. E. This sum, together with the $18.4 million Class 6D payment, must be credited against the Initial Payment and subsequent Annual Payment Ceilings until the total amount is credited. Attachment D to the Hinton Declaration reflects the adjustments to the Annual Payment Ceilings that must be made to take into account the NPV of the Class 6D Payment as of the Effective Date. Ex. 1, Att. D; *see* Ex. 14 (DTA) § 4.01(c).

C. <u>Time Value Credits Applicable To Post-Effective Date Payments</u>

1. <u>Pre-Effective Date Insurance Proceeds held on the Effective Date</u>

The FPA requires that Insurance Proceeds held by DCC on the Effective Date "be . . . paid to the Trust 90 days after the Effective Date." Ex. 3 (FPA) § 2.01(a)(ii). DCC transferred those Insurance Proceeds, aggregating $211,456,278, in June 2004, after the Effective Date but well before the 90-day payment deadline. Section 2.01(a)(ii) of the FPA prescribes the Time Value Credit required for early payment of these Insurance Proceeds. It provides that they

> shall 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.

The unadjusted Annual Payment Ceilings for Funding Periods 1, 2 and 3 are $47 million, $103 million, and $374 million, respectively.

The Time Value Credit attributable to the Insurance Proceeds from the date of payment to the beginning of Funding Period 1 totals $14,689,360 applying the Plan's 7% discount rate. Ex. 1, Att. E. Because earlier Advance Payments (applying FIFO) and associated Time Value Credits exhausted the adjusted Annual Payment Ceilings through Funding Period 2, the

$211,456,278 in Insurance Proceeds, $14,689,360 in Time Value Credits and an additional $32,768,503 in Time Value Credits earned in Funding Periods 1 and 2 must be rolled forward and credited against the adjusted Annual Payment Ceiling for Funding Period 3, so that the Annual Payment Ceiling for Funding Period 3 is adjusted appropriately to avoid exceeding the $2.35 billion NPV cap. Any excess, with accruing Time Value Credits, similarly must be carried forward and credited to successive Annual Payment Ceilings until used up.

As set forth on Attachment E to the Hinton Declaration, the total of the Time Value Credits for the Insurance Proceeds equals $47,732,316. Attachment D reflects the adjustments to the Annual Payment Ceilings that must be made to reflect the full effect of the advance payment of these Insurance Proceeds on subsequent Annual Payment Ceilings for Funding Periods 3 and 4. *See* Ex. 3 (FPA) §§ 2.01(a)(ii), 2.02(d), and 2.05.

2. <u>Payment to the MDL 926 Settlement Fund</u>

In June 2004, the Escrow Agent for MDL 926 transferred $2.9 million from the DCC MDL 926 escrow account to the MDL 926 Settlement Fund on behalf of the Settlement Facility for access to and use of MDL 926 Claims Office Materials. *See* Ex. 17. This payment was an Advance Payment, because the applicable Annual Payment Ceiling had been satisfied. Accordingly, it is entitled to a Time Value Credit, and the Annual Payment Ceilings must be adjusted, as provided in the FPA, to reflect its NPV. As set forth on Attachment E to the Hinton Declaration, the Time Value Credit applicable to the $2.9 million payment earned in Funding Period 0 is $197,995. Ex. 1, Att. E. The $2.9 million payment and Time Value Credit, and any excess, which similarly accrues Time Value Credits, must be credited and carried forward to successive Annual Payment Ceilings until used up. The total of the Time Value Credits for the $2.9 million payment to the MDL 926 Settlement Fund equals $646,894. *Id.*, Att. E. Attachment D to the Hinton Declaration reflects the adjustments to the Annual Payment Ceilings that must be made to reflect the full effect of the payment on successive Annual Payment

Ceilings and to preserve the $2.35 billion NPV funding cap. *Id.*, Att. D; *see* Ex. 3 (FPA) §§ 2.01(a)(ii), 2.02(d), and 2.05.

3. <u>MDL Cash Payments</u>

On June 8, 2004, the Escrow Agent for MDL 926 transferred $2,176,572 from the DCC MDL escrow account to the Settlement Facility.[11] An additional $4,084 was paid on September 8, 2004. *See* Ex. 1, Att. B. These cash transfers were Advance Payments, because there were no outstanding requests for funding by the Settlement Facility, and earlier Advance Payments (applying FIFO) and associated Time Value Credits had exhausted the adjusted Annual Payment Ceilings for Funding Period 0. These payments, accordingly, are entitled to Time Value Credits, and the Annual Payment Ceilings must be adjusted, as provided in the FPA, to reflect their NPV. The Time Value Credit applicable to the MDL Cash Payments earned in Funding Period 0 is $148,812. *Id.*, Att. E. The MDL Cash Payments and Time Value Credit, and any excess, which similarly accrues Time Value Credits, must be credited and carried forward to successive Annual Payment Ceilings until used up. As set forth on Attachment E, the total of the Time Value Credits for the MDL Cash Payments equals $486,695. Attachment D to the Hinton Declaration reflects the adjustments to the Annual Payment Ceilings that must be made to reflect the full effect of the MDL Cash Payments on successive Annual Payment Ceilings. *Id.*, Att. D; *see* Ex. 3 (FPA) §§ 2.01(a)(ii), 2.02(d), 2.05.

4. <u>Class 4A Payment</u>

On June 10, 2004, DCC paid $7.2 million to Class 4A claimants. Under the SFA, this amount is to be offset against the amounts to be paid by Reorganized DCC to the Settlement Facility under the FPA. *See* Ex. 5 (SFA) § 3.02(a)(ii). DCC is entitled to a credit for this

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[11] This payment was received by the Depository Trust on June 10, 2004.

payment and (applying FIFO) total Time Value Credits for the Class 4A payment equaling $1,606,081. Ex. 1, Att. E; *see* Ex. 1, Att. D(reflecting application of these credits).

5. <u>Excess Insurance Proceeds paid after the Effective Date</u>

After the Effective Date of the Plan and prior to Funding Period 3, $214,363,369 in Insurance Proceeds was paid to the Settlement Facility. *Id.*, Att. B. These proceeds qualify as Excess Insurance Proceeds under Section 2.03(a) of the FPA. Under that provision, these proceeds and associated Time Value Credits are to be credited against Annual Payment Ceilings due in Funding Periods 5-8, with 50% to be credited in Funding Period 5, 30% in Funding Period 6, and 10% to be credited in each of Funding Periods 7 and 8. The total of the Time Value Credits for the Excess Insurance Proceeds equals $81,990,456. *Id.*, Att. E; *id.*, Att. D (reflecting the adjustments to the Annual Payment Ceilings that must be made to reflect the full effect of the accelerated payment of these Excess Insurance Proceeds on succeeding Annual Payment Ceilings). Ex. 3 (FPA) §§ 2.01(a)(ii), 2.02(d), 2.05.

6. <u>$57,736,990 in Insurance Proceeds paid in Funding Period 3</u>

$57,736,990 in regular insurance proceeds was paid in Funding Period 3, when there was no outstanding Annual Payment Ceiling.[12] Accordingly, as shown on Attachment E to the Hinton Declaration, this sum earned $2,033,086 as a Time Value Credit during Funding Period 3. Attachment D to the Hinton Declaration reflects the application of these credits, which is necessary to preserve the total NPV of $2.35 billion that is fixed by the Plan..

<u>CONCLUSION</u>

The parties bargained for a $2.35 billion NPV cap, and agreed to preserve this cap by providing for adjustments, at a 7% discount rate, based on the timing of payments. The

[12] $130,307,593 in insurance proceeds were paid to the Settlement Facility in Funding Periods 3, 4 and 5 (through September 30, 2009), $72,570,603 of which was applied to then-current Payment Ceilings and so did not accrue Time Value Credits.

foundational premise of the Plan, and the agreed-upon payment stream, will be jeopardized if these fundamental principles are not followed. Accordingly, DCC respectfully requests that the Court enforce the Plan's $2.35 billion NPV funding cap and ensure that it is not exceeded by confirming that the Advance Payments and any accelerated payments after September 30, 2009 result in adjustments to all applicable Annual Payment Ceilings through application of Time Value Credits calculated at the rate of 7% per year to the Effective Date, compounded annually, in accordance with the methodology set forth in the Hinton Declaration, until the payments and the Time Value Credits are fully credited, applying the FIFO accounting methodology. *See* Ex. 1.

Dated: January 8, 2010

Respectfully submitted,

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DEBTOR'S REPRESENTATIVE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PROPOSED ORDER OF DOW CORNING CORPORATION TO ENFORCE APPLICATION OF TIME VALUE CREDITS UNDER THE AMENDED JOINT PLAN OF REORGANIZATION AND RELATED DOCUMENTS

The Court, having considered Dow Corning Corporation's ("Dow Corning") Motion To Enforce Application Of Time Value Credits Under The Amended Joint Plan Of Reorganization And Related Documents ("Time Value Credit Motion") and the Claimants' Advisory Committee's opposition thereto, the Court finds and concludes as follows:

1. The Time Value Credit Motion is meritorious and should be granted.

2. DCC Corning is entitled to credit, and Time Value Credits, against its annual Plan funding obligations for the:

   a. $985,000.000 Initial Payment;

   b. $18,400,000 paid to settle Class 6D Claims;

   c. $211,456,278 in insurance proceeds;

   d. $2,900,000 paid to the MDL 926 Settlement Fund;

   e. $2,180,656 in cash paid from Dow Corning's MDL 926 escrow account;

   f. $7,200,000 Class 4A payment;

   g. $214,363,369 in Excess Insurance Proceeds; and

   h. $57,736,990 in regular Insurance Proceeds paid in Funding Period 3.

3. Dow Corning's calculation methodology correctly interprets the Amended Joint Plan of Reorganization, dated February 4, 1999 (as updated June 1, 2004), the Funding Payment Agreement (as amended as of June 1, 2004) and related documents.

4. Dow Corning's calculations correctly calculate the Time Value Credits to which it is entitled.

5. As a result of the payments describe above, Dow Corning is entitled to Time Value Credits through September 30, 2009 that total $370,087,085 in the aggregate, and the Claims Administrator is directed to adjust the Annual Payment Ceilings accordingly.

ACCORDINGLY, it is hereby ORDERED, this ____ day of ______________ 2010 that, the Motion is GRANTED in all respects.

____
DENISE PAGE HOOD
United States District Judge

DSMDB-2713167v03

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2010 a true and correct copy of the following motion was served via electronic mail or first class mail upon the parties listed below:

DOW CORNING CORPORATION'S MOTION TO ENFORCE APPLICATION OF TIME VALUE CREDITS UNDER THE AMENDED JOINT PLAN OF REORGANIZATION AND RELATED DOCUMENTS

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