UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

RESPONSE OF DOW CORNING CORPORATION TO MDL 926 SETTLEMENT FUND MOTION FOR RESOLUTION OF LIEN CLAIMS AGAINST SETTLEMENT FACILITY – DOW CORNING TRUST PAYMENTS TO CLAIMANTS

Dow Corning Corporation ("Dow Corning") respectfully submits this *Response of Dow Corning Corporation to MDL 926 Settlement Fund Motion For Resolution of Lien Claims Against Settlement Facility – Dow Corning Trust Payments to Claimants*.

On June 29, 2007 the MDL 926 Settlement Fund ("MDL 926 Fund"), "by and through" its Escrow Agent, Edgar C. Gentle, III ("Movant"), filed the *MDL 926 Settlement Fund Motion For Resolution of Lien Claims Against Settlement Facility – Dow Corning Trust Payments to Claimants* (the "Motion") and accompanying Memorandum and documentation in support thereof. The Motion seeks extensive relief – an Order directing the Settlement Facility-Dow Corning Trust ("SF-DCT") to produce documentation to the MDL 926 Fund, "honor the Lien Claims consented to by the Lien Claimants," "[r]ecognize the validity of the MDL 926 Liens against payments by SF-DCT to Lien Claimants," "[e]stablish procedures for payment of the 60 Current Liens to

MDL 926 [Fund] not consented to by the Claimants," issue documentation "for the Additional Current Liens and Future Liens," and "[d]esignate the procedures established for processing the 60 Current Liens as precedent for the processing of the Additional Current Liens and any Future Liens." Motion at 5.

This Court's June 18, 2007 *Order Pursuant to Section 3.03 of Exhibit 1 to the Stipulation and Order Approving Lien Resolution Procedures* (the "Lien Order"), pursuant to which this Response and the Motion are submitted, states: "It appears that there is a common threshold issue that is applicable to all lien claims asserted by the MDL-926 Settlement Fund, that is, whether the MDL-926 Settlement Fund has standing or any legal basis to assert a lien against Settling Claimants in the Dow Corning case." Lien Order ¶ 3. The Court established a schedule directing the respective parties to file submissions on this discrete and potentially dispositive point – "for the purpose of determining this issue." *Id*. Thus, contrary to Movant's assertion that "[t]his Court is asked to decide if the claimants are to receive a windfall payment by the SF-DCT," the threshold issue before the Court does not involve a determination as to specific claimants. Memorandum at 1.

Movant has not complied with the Court's directive, failing even to articulate the legal elements required to establish the liens that the Motion seeks. Instead, Movant mischaracterizes the requirements of the Amended Joint Plan of Reorganization (the "Plan"), invokes a vague concept of "equity" and asks the Court to issue sweeping

remedial directives that are beyond the scope of both the threshold issue to be addressed in this proceeding and the Plan. Dow Corning submits this Response to clarify salient points regarding the Plan, to protect the integrity of the funds held and distributed by the SF-DCT and to assist the Court in determining the propriety of the liens at issue.

I. THE THRESHOLD ISSUE BEFORE THE COURT MUST BE PROPERLY ADJUDICATED, CONSISTENT WITH THE TERMS OF THE PLAN

Neither the SF-DCT nor Dow Corning owes a duty to the MDL 926 Fund with regard to claimant compensation or dispute resolution. Nonetheless, Movant asserts that the SF-DCT has "failed" to pay certain liens and "failed" to provide certain information with respect to said liens, and that the MDL 926 Fund is "disadvantaged" as a result. Motion ¶ 3. Movant's claims have no basis in law, fact or equity.

A. Dow Corning's Primary Interest is Ensuring Procedural Propriety With Respect to Distribution of Funds From the SF-DCT

Dow Corning's primary interest with regard to the present matter is to ensure that the subject liens are properly adjudicated so that the Settlement Fund assets are properly protected. More generally, Dow Corning's responsibility is to ensure compliance with the terms of the Plan. The Plan is a contract and a judgment of the Court; both the Court and the Plan Proponents may look only to its terms to establish rights under the Plan. Nothing in the Plan grants the MDL 926 Fund any rights with regard to payments made by the SF-DCT, and the MDL 926 Fund has no authorization

to evaluate the decisions or actions of the SF-DCT.[1] Likewise, the SF-DCT is charged to distribute funds appropriately under the Plan and has no role in determining compensation distributed on behalf of the MDL 926 Fund.[2]

The Plan sets forth specific terms and criteria for compensation to claimants. A claimant who satisfies the requirements for compensation is entitled to receive a payment from the SF-DCT. The Plan neither conditions such payments on the actions of any other entity nor authorizes the SF-DCT to take into consideration payments made to claimants by other entities, including the MDL 926 claims office. If the SF-DCT were simply to divert payments from eligible claimants to the MDL 926 claims office on the theory that there should be some maximum payment from the two settlements combined, or that the MDL 926 claims office made an incorrect determination on the claim under the Revised Settlement Program, then the SF-DCT would be in violation of the Plan. The Plan does not grant to the SF-DCT the right to determine that there is a maximum payment that is not specified in the Plan.

Movant's demand that the SF-DCT (and this Court) adjust payments to claimants based upon prior actions of the MDL 926 claims office seeks to graft new terms into the

[1] Further, the MDL 926 Fund is not an entity authorized to bring such an action in any event – it is a bank account through which funds are funneled on an as-needed basis. The MDL 926 claims office is simply the agent that reviews claims and supervises payments on behalf of the companies that fund the settlements. If the MDL 926 Fund erred in remitting compensation, Dow Corning is at a loss to identify an injury to the MDL 926 Fund that is redressable by way of a lien against the SF-DCT.

[2] This Court has not issued an order appointing Movant to act in any capacity on behalf of the MDL 926 Fund. Dow Corning is unaware of the role he plays in determining liens against the SF-DCT.

Plan: in short, it is essentially an impermissible attempt to modify the Plan in violation of the Bankruptcy Code and the terms of the Plan. The Plan can be modified only by consent of the Plan Proponents or the Reorganized Debtor. *See* 11 U.S.C. Section 1127(b) ("The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan.... Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title."); *see also In re Superior Used Cars, Inc.*, 258 B.R. 680, 688 (Bankr. W.D. Mich. 2001) ("Section 1127(b) of the Bankruptcy Code allows post-confirmation modification *by the proponent of the plan or the reorganized debtor*, if the modification occurs prior to 'substantial consummation.'") (emphasis added); *LLP Mortgage, Ltd v. Park Bowl, Inc.*, No. 02-CV-10278-BC, 2003 WL 22995011, at *5 (E.D. Mich. Dec. 4, 2003) (finding that, after confirmation, a plan may be modified by the debtor only in certain circumstances). Movant is neither a Plan Proponent nor the Reorganized Debtor and may not seek to modify the Plan.[3]

[3] A court also cannot, *sua sponte*, modify a confirmed plan. *See In re Dow Corning Corp.*, 255 B.R. 445, 508 (E.D. Mich. 2000) (Hood, J.) ("The Code states that only the proponents can modify a plan and that this Court's role on appeal is either to affirm or reverse the Bankruptcy Court's confirmation of the Joint Plan.") (citing 11 U.S.C. § 1127(b)), *aff'd and remanded*, 280 F.3d 648 (6th Cir.), *cert. denied*, 537 U.S. 816 (2002); *In re MCorp Financial, Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex. 1992) ("Pursuant to Section 1127, only the proponent of a Chapter 11 plan can seek to have it modified. … The bankruptcy court cannot, *sua sponte*, modify the Chapter 11 plan."), *appeal dismissed and remanded*, 139 B.R. 820 (S.D. Tex. 1992); *see also In re Rickel & Assocs., Inc.*, 260 B.R. 673 (Bankr. S.D.N.Y. 2001) (bankruptcy court cannot modify a confirmed Chapter 11 plan pursuant to its general equitable powers and produce a result at odds with the specific provisions

Recognizing that there could be legally valid liens against distributions from the SF-DCT perfected under state law, the Court adopted procedures to determine the validity of the liens. These procedures create a mechanism for adjudication of the asserted liens by a court of competent jurisdiction. The procedures do not create or imply a negotiation between the two settlements to determine the appropriate amount of compensation due to a claimant who applied to both facilities. As stated, Dow Corning's foremost interest is to ensure that the assets of the Settlement Fund are protected, and that there is no risk that the SF-DCT will be required to pay a claim twice due to failure to resolve the asserted lien properly. The Plan places no obligation upon the SF-DCT to consult with the MDL 926 Fund and does not grant to the SF-DCT the right to modify payment amounts in light of compensation received from other sources, except as expressly noted in the Plan. An Order compelling such actions would amount to an unauthorized modification of the Plan.

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of the section of the Code governing modification of confirmed plans). Moreover, a request for post-confirmation modification must be made prior to substantial confirmation of the plan. *See In re Superior Used Cars*, 258 B.R. at 688 (confirmed plan was substantially consummated and could not be modified); *In re Best Prods. Co., Inc.*, 177 B.R. 791, 802 (S.D.N.Y. 1995) ("section 1127(b) of the Bankruptcy Code provides that a plan cannot be modified after substantial consummation"); Norton Bankruptcy Law & Pract. 2d Section 94:2.

B. Nothing in the Plan Addresses the "Double Dipping" or "Reciprocity" Alleged in the Motion

As this Court is aware, the Plan contains a deliberately structured process whereby claimants who elect to have their claims resolved under the settlement option are compensated. *See generally* Settlement Facility and Fund Distribution Agreement ("SFA") Annex A, Article VI ("Settlement Options").[4] The Plan says nothing, however, about "double dipping" into multiple settlement funds or accounting for payments by the MDL 926 Fund. Movant's suggestion that "potential overpayment of claims should be remedied by set-off" in favor of the MDL 926 Fund is without basis in the Plan, in fact or in law. Memorandum at 12. Any mention of "set-off" in the Plan is limited to Dow Corning payments only. *See* SFA § 7.02(c) ("Set-Off for Prior Payment") ("The Claims Administrator shall adjust the Allowed amount to deduct the amount of any payments previously made to the Claimant . . . under the *Dow Corning Removal Assistance Program*, or any payments in prior partial settlements *between Dow Corning and the Claimant*") (emphasis added).

The Plan neither provides nor expresses an intent for "reciprocity" between the MDL 926 Fund and the SF-DCT. Movant goes to great lengths to characterize the "complementary payment programs" at the MDL 926 Fund and the SF-DCT; nothing in

[4] Additionally, the SFA provides that "[c]laims that satisfy the eligibility criteria specified in the Claims Resolution Procedures shall be paid as specified at Section 7.02. Only those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment. . ." SFA § 5.01(a) ("Claims Resolution Procedures/Eligibility Guidelines").

the Plan, however, authorizes the sort of negotiation and exchange suggested in the Motion. Dow Corning does not dispute that the standards being applied by the SF-DCT are the current guidelines of the MDL 926 claims office. This is exactly what the Plan authorizes and requires. The Plan does not authorize, however, collaboration between the MDL 926 Fund and the SF-DCT to evaluate the total payment issued to individual claimants and jointly determine whether a claimant has received a "windfall." Such a determination assumes that there is a specific dollar amount that constitutes one hundred percent recovery.[5] Further, the fact that both the MDL 926 Fund and the SF-DCT include a discount for multiple manufacturers is inapposite: the discount is based on the products identified in the medical records and not upon the amount of payment the claimant has received from another source. For example, a claimant may have received a Disability Level C payment in the MDL 926 (with a discount to account for the presence of a Dow Corning implant) and then may receive a Disability B level payment in the SF-DCT. The two payments are not equal. SF-DCT did not contemplate a specific, overall maximum payment to claimants and has no reason to be involved in any compensation to a claimant beyond payments from the SF-DCT. The SF-DCT and

[5] Indeed, a claimant who opted out of the MDL 926 settlement option and separately settled with one of the manufacturers involved in the MDL might have received a payment greater than that offered by the MDL 926 settlement. Yet Movant does not suggest that the SF-DCT should examine such claimants and establish some sort of offset to assure that no claimant receives more than a perceived maximum.

the MDL 926 Fund are separate, distinct funds – payment from one has no bearing upon payment from the other.

Further, the SFA prohibits the MDL 926 Fund from seeking a lien against SF-DCT funds by providing that:

> All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, and no Claimant or any other party can execute upon, garnish or attach the Settlement Facility in any manner or compel payment from the Settlement Facility of any Claim.

SFA § 10.09 (emphasis added).

Movant's analogy – "[i]t's like a Chevy dealership with a repair shop and a body shop for a wrecked vehicle needing repairs and body work. If the customer overpaid for repairs, the body shop should credit the overcharge on its bill" – inaccurately characterizes the operation of the MDL 926 Fund and the SF-DCT and the independent nature of the two settlement funds. As demonstrated above, there is no such "credit" between the MDL 926 Fund and SF-DCT, and neither law nor equity sanctions Movant's effort to modify the Plan to manufacture any such correlation.

II. THE MDL 926 FUND IS NOT ENTITLED TO AN EQUITABLE LIEN ON SF-DCT FUNDS

Further, Movant fails either to acknowledge the elements essential to an equitable lien or to establish that the MDL 926 Fund is entitled to an equitable lien on claimant funds held by the SF-DCT. A party seeking an equitable lien must establish three elements: "(1) that there exists an express or implied agreement between the

parties demonstrating a clear intent to create a security interest in order to secure an obligation between them; (2) that the parties intended specific property to secure the payment; (3) and that there is no adequate remedy at law." *In re RONFIN Series C Bonds Sec. Interest Litig.*, 182 F.3d 366, 371 (5th Cir. 1999); *see also Skip Kirchdorfer, Inc. v. U.S.*, 6 F.3d 1573, 1581 (Fed. Cir. 1993) ("An equitable lien has three requirements: an obligation of the property owner to the lien holder, a res – identifiable with reasonable certainty – to which that obligation fastens, and an intent that the res secure performance of the underlying obligation.") (citing 51 Am.Jur.2d, Liens § 24 (1970)).

Movant conflates the essential elements of an equitable lien with principles of equitable relief, generally, and obfuscates the duty of this Court to determine whether the MDL 926 Fund can make the evidentiary showing necessary for the former. For example, at the outset of Movant's attempt to establish the MDL 926 Fund's entitlement to an equitable lien, Movant addresses the "equitable doctrine of unjust enrichment" with reference to *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988), which involved a claim for reimbursement from a community estate in the context of a divorce case. *Penick* has no persuasive bearing upon the present proceeding, which, at this Court's explicit directive, is to address the validity of lien claims.[6]

[6] The remainder of the cases cited by Movant are equally inapposite and affirm the position advocated in this Response – that a party asserting an equitable lien must establish more than that which is set forth in the Motion. *See* Memorandum, 14-16. For example, *Richards v. Suckle*, 871 S.W.2d 239, 242 (Tex. App. 1994), confirms that "[t]he foundation of every equitable lien is a contract, either express or implied, which deals with or operates on some specific property." *See also Bray v. Curtis*, 544 S.W.2d 816, 819

A. There is No Express or Implied Agreement Between the MDL 926 Fund and the SF-DCT Demonstrating a Clear Intent to Create a Security Interest to Secure an Obligation Between Them

Even assuming that Movant is correct in his interpretation of the Lien Procedures, the Procedures do not create a present right to a security interest in SF-DCT funds to satisfy the first element of an equitable lien. *See, e.g.*, *In re RONFIN*, 182 F.3d at 374 (noting "there is a difference between giving an 'absolute present right to security,' which can be the basis for an equitable lien, and a promise of action in the future to create a right of security, which does not give rise to an equitable lien."); *Skip Kirchdorfer, Inc.*, 6 F.3d at 1581 (Fed. Cir. 1993) (affirming a conclusion that an "asserted right to retain possession [ ] based on an inchoate claim" was insufficient to establish an equitable lien); *Calcasieu Nat'l Bank v. Bank of Abbeville & Trust Co.*, 83 F.2d 742, 743 (5th Cir. 1936) ("We do not find in the facts presented by this record the elements requisite to raise an equitable lien in behalf of appellee, the forwarding bank and owner of the

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(Tex. Civ. App. 1976) (granting a lien to a pickup truck owner as against a wrecker service; noting that "[t]he fundamental element necessary to create an equitable lien is the existence of an express or implied contract and it does not arise except out of a contract between the parties."); *First Nat'l Bank, Big Spring v. Conner*, 320 S.W.2d 391, 394 (Tex. Civ. App. 1959) (noting, in a suit between used car dealers, that "[a]fter a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, is in equity a lien." (quoting *Williams v. Greer*, 122 S.W.2d 247, 248 (Tex. Civ. App. 1938))); *Luse v. Rea*, 207 S.W. 942, 944 (Tex. Civ. App. 1918) (finding, in suit to recover for breach of warranty against encumbrances on land, that "recitation in the notes themselves that they are secured by a deed of trust lien on said land. . .would, we believe, authorize a court of equity to decree an equitable lien against said land."); *Williams*, 122 S.W.2d at 249 ("So, we think, where a check is given in payment of real or personal property, the vendor has a lien on the property by implication, as between the parties and their privies with notice.").

checks. There was no trust relation between the parties, no augmentation of the assets of the insolvent bank, and no tracing of the funds into the hands of the conservator.").

By their very name, the Lien Procedures are just that: procedures. By definition, they provide a mechanism "for distributing payments involving liens or disputed payees." Amended Stipulation and Order Establishing Procedures For Review of Asserted Liens Against Settling Implant Claimants at 1. Substantively, the Lien Procedures provide nothing more. Under Movant's own characterization, the "SF-DCT may honor the lien unless it is deficient or invalid" and "[i]f the claimant affirmatively consents to the alleged lien, SF-DCT may honor the lien." Memorandum at 6 (emphasis added).

Moreover, the Procedures contain decidedly discretionary language with respect to payment by the SF-DCT of the asserted liens. For example, Section 4.02 provides:

> b. If the Claimant fails to file the Notice of Objection of Resolution of Lien form, as specified at Section 4.02(a) above, then the SF-DCT shall be authorized to honor the asserted lien (but is not required to do so if the lien is otherwise deficient or invalid) and pay the Claimant minus the Alleged Lienholder's lien amount.
>
> c. If the Claimant submits the Notice of Objection or Resolution of Lien form and informs the SF-DCT that she consents to the lien and the lien amount or has resolved the lien, the SF-DCT is authorized to withhold the agreed amount from the Claimant's payment.

Lien Procedures § 4.02(b),(c).

The "Dispute Resolution Procedures" in the Procedures also provide the Lien Judge substantial discretion:

> The Lien Judge may use any commonly accepted form of dispute resolution appropriate to the nature of the dispute, at the sole discretion of the Lien Judge, including ruling on the merits based solely upon the materials provided.
>
> The Lien Judge shall permit no form of discovery between the parties; however, the Lien Judge may seek additional information and documents from the parties, the SF-DCT and/or other sources at his/her discretion.

Lien Procedures at §§ 6.01, 6.02.

This language is indisputably discretionary and, as the *RONFIN* court noted, "the discretionary [ ] language of the instant agreement is critical, because it belies the notion that the agreement manifested an intent to create a security interest: It fails to commit the debtor to using its property, under any objective set of circumstances, in satisfaction of its debt." *In re RONFIN*, 182 F.3d at 375.

B. The MDL 926 Fund Can Point to No Specific Funds Designated to Secure the Asserted Liens

With respect to the second element, "the plaintiff must show that 'the parties intended specific property to secure payment.' This property must be identified 'with reasonable certainty.'" *Id.* at 371 (quoting *In re Daves*, 770 F.2d 1363, 1367 (5th Cir. 1985); *Skip Kirchdorfer, Inc.*, 6 F.3d at 1581). Further, "the property must be distinguished from the general assets of the debtor." *Id.* (quoting *In re Magrill*, 22 F.2d 757, 758 (5th Cir. 1927)). In *In re Magrill*, the Fifth Circuit examined an attempt to impose an equitable lien on a debtor's property, lumber, by a creditor based upon a written contract

executed prior to the filing of debtor's bankruptcy petition. *In re Magrill*, 22 F.2d at 758-59. The court concluded that the creditor was not entitled to a lien, stating:

> Such a claim as the one asserted, that property in possession of a debtor is subject to a lien or charge in favor of a creditor to secure a debt to the latter, is not sustainable, unless the property intended to afford security is identified, or so described as to be capable of identification and separation from other property or assets of the debtor, which the latter is at liberty to dispose of to third parties free of any charge or lien, and to replace it, or not, as he sees fit.

Id. at 759.

Movant makes no showing whatsoever as to this element. Indeed, Movant cannot point to specific funds to secure the asserted liens. Although Movant refers to the amount that Dow Corning initially contributed to the class action settlement in *Lindsey v. Dow Corning, et al*, Dow Corning withdrew this amount from the settlement fund that was ultimately made available for distribution by the MDL 926 Fund, and it was not set aside or earmarked in any way. Indeed, it appears that, with respect to the asserted liens, Movant points generally to the SF-DCT fund at large and does not and cannot even specify the monetary amount sought. This is plainly insufficient under applicable law.

C. The MDL 926 Fund Has Not Established That It Has No Adequate Remedy at Law

As to the third element of an equitable lien – when, as here, an alternate lawsuit is available to recover the funds sought by an entity asserting a right to an equitable lien, such alternative constitutes an "adequate legal remedy." *In re RONFIN*, 182 F.3d at

373-74 (finding lawsuit to be an adequate legal remedy notwithstanding difference in defendants and fact that defendants in alternate proceeding resisted jurisdiction). To determine otherwise would violate the "general rule that a court in equity should not act when the moving party has an adequate remedy at law." *Id.* at 373 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)). To this end, if the MDL 926 Fund wishes to assert a lien, any such lien would have to involve the underlying claimant – Movant, in fact, seeks funds paid to claimants.

D. "Equity" Does Not Remedy the Infirmity of the MDL 926 Fund's Assertions

Neither does "equity" remedy the infirmity of the Movant's assertions. *See U.S. Bank Nat. Ass'n v. Safeguard Ins. Co.*, 422 F.Supp. 2d 698, 706 (N.D. Tex. 2006) ("In Texas, complainants in equity have historically borne the burden of proof to establish superior title to property.") (citing *McAfee v. Wheelis*, 1 Posey Unrep.Cas. 65, 71, 1879 Tex. LEXIS 156, at *10 (Tex. Comm'n App. 1879) ("They are seeking to set up and enforce a tacit equity against persons standing on a legal title complete and fair on its face; and, therefore, they must assert and establish the facts which constitute their equity.")). Accordingly, this maxim weighs in favor of placing the burden on the MDL 926 Fund as the party who asks that the court do equity. *See Safeguard Ins. Co.*, 422 F.Supp.2d at 706. As demonstrated in this Response, Movant has not met this burden.

Conclusion

For the foregoing reasons, the Motion should be denied.

Respectfully submitted this 1st day of August 2007.

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN RE:	§	**CASE NO. 00-CV-00005-DT**
	§	
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
REORGANIZED DEBTOR	§	**HON. DENISE PAGE HOOD**

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007 a true and correct copy of the following consent order was served via electronic mail or first class mail upon the parties listed below:

RESPONSE OF DOW CORNING CORPORATION TO MDL 926 SETTLEMENT FUND MOTION FOR RESOLUTION OF LIEN CLAIMS AGAINST SETTLEMENT FACILITY – DOW CORNING TRUST PAYMENTS TO CLAIMANTS

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