Case No. 11-2632

In The 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 APPELLEE CLAIMANTS' ADVISORY COMMITTEE

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Ernest H. Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Counsel for the Claimants' Advisory Committee

STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

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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.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the District Court abused its discretion or clearly erred in holding that Dow Corning was not entitled to a Time Value Credit of approximately $230 million based on having conditionally transferred the Initial Payment into a Depository Trust escrow account pre-Effective Date – as required by the Amended Joint Plan of Reorganization (the "Plan") – when, among other things, the parties had separately agreed to dedicate the time value of most of the Initial Payment for the benefit of the Trust starting at an earlier fixed date.

2. Whether the District Court abused its discretion or clearly erred in limiting the other Time Value Credits claimed by Dow Corning to circumstances provided for under the plain language of the Plan documents.[1]

STATEMENT OF THE CASE

The Plan documents provide for Dow Corning to receive a Time Value Credit ("TVC") to compensate for the lost earning power of certain funds that it contributes to the Depository Trust (the "Trust") post-Effective Date but ahead of the Plan's funding schedule. However, Dow Corning's attempt to claim a similar credit for having transferred the Initial Payment into escrow *pre*-Effective Date is inconsistent with the plain language and structure of the Plan and the parties' intentions and conduct, and the District Court correctly rejected it.

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[1] Abbreviated terms not otherwise defined have the same meanings defined in Dow Corning's opening brief ("DCC Br.").

The Plan was premised on Dow Corning's agreement to pay $2.35 billion to resolve its liability to recipients of Dow Corning breast implants and other implanted medical products. Dow Corning bargained to pay most of this money over time following the Plan Effective Date, and therefore the nominal amounts of its future payments – other than the $985 million Initial Payment due on the Effective Date – had to be *increased* to have the same Net Present Value ("NPV") as if the entire amount had been paid at the outset. The resulting payment schedule was embodied in the Annual Payment Ceilings set forth in the Funding Payment Agreement ("FPA"). In certain circumstances where the FPA timetable is accelerated by the early receipt of funds (principally insurance) post-Effective Date but ahead of the payment schedule, Dow Corning is entitled to a TVC adjustment in certain Annual Payment Ceilings. The parties agreed to make all of these adjustments at the rate of 7% per annum.

Wholly apart from this post-Effective Date payment schedule, Section 7.4 of the Plan provided for Dow Corning to transfer the Initial Payment into escrow pre-Effective Date if, as the parties understood was possible, Plan implementation was delayed by an appeal challenging the Plan's funding caps or third party release provisions. These funds were to be held conditionally until the Effective Date because, if confirmation of the Plan were reversed, they would have to be returned to Dow Corning. This contractual escrow structure conformed to the general rule

that payments to unsecured creditors can be made only pursuant to a confirmed and implemented plan of reorganization. Thus, as a matter of law as well as contract, the Initial Payment could not be released unconditionally for the benefit of tort claimants until the Effective Date, and the Plan unsurprisingly does not provide any TVC in connection with the escrowing of the funds.

Dow Corning's conditional pre-Effective Date transfer of the Initial Payment had great symbolic importance to tort claimants, who had lived through a prior failed settlement and waited years for their claims to be resolved through the bankruptcy process, but it was not intended to have economic consequences. This conclusion is supported by a compromise embodied in the Plan documents that Dow Corning now seeks to unravel. Dow Corning bargained to have the Effective Date – whenever it occurred – be the date used to determine the value of its payments under the Plan, rather than having the value of the settlement fixed as of 1998, when the funding cap and payment schedule were first negotiated. This provided a huge benefit to Dow Corning – it significantly reduced the true value of the settlement, because the NPV of $2.35 billion paid as of June 1, 2004, discounted back to December 31, 1998 at 7% per annum, is only approximately $1.63 billion. In return for this important benefit, Dow Corning agreed to fix a date (ultimately determined to be the Interest Accrual Date of April 30, 1999) after which the earning power of most of the Initial Payment would accrue *for the*

benefit of the Trust – even if it were not actually transferred to the Trust until later. Dow Corning promised to pay the actual interest it earned on the money after that date *outside* the $2.35 billion cap and *without* claiming a TVC.

The heart of Dow Corning's appeal is the remarkable claim that, having bargained to give the Trust the benefit of the time value of the Initial Payment starting from the Interest Accrual Date, Dow Corning should nevertheless get a TVC of more than $230 million – taking back for itself the time value of the same money – because it also (as contemplated by the Plan) physically transferred the funds to the Trust (to continue to be held in escrow) ahead of the Effective Date. But even if the conditional transfer of the Initial Payment into escrow, where it could not be used to pay claims, were deemed a "payment" under the not-yet-effective Plan, nothing in the Plan documents provides for Dow Corning to receive a TVC in such circumstances. Giving Dow Corning such a credit here would simply undo the bargain it struck in assigning the earning power of that money to the tort claimants as of 1999.

The District Court correctly held that the plain language of the Dow Corning Plan documents does not contemplate awarding this massive credit for funds paid conditionally into escrow prior to the Effective Date. While the District Court found the Plan documents to be unambiguous and thus did not discuss available parol evidence of the parties' conduct, it is undisputed that Dow Corning delayed

and resisted transferring the Initial Payment for many months – conduct that would be irrational if it believed that simply by moving these funds from one escrow to another it would earn a TVC of approximately $65 million per year. This Court may affirm on the alternative ground that the parties' conduct confirms the District Court's reading of the language of the Plan documents.

The District Court correctly approved the bulk, in dollar amount, of Dow Corning's other claimed TVC adjustments. With respect to a series of contested smaller adjustments, the Court correctly held that the plain language of the Plan documents did not support the claimed credits.

A. Statement of Facts

1. Governing Provisions of the Plan Documents

Dow Corning's Plan is based on a comprehensive settlement negotiated with the Tort Claimants' Committee ("TCC"), predecessor to Appellee Claimants' Advisory Committee ("CAC"), under which Dow Corning agreed to pay up to $2.35 billion NPV to the Trust to resolve all tort claims arising out of its sale and marketing of silicone gel breast implants and other implantable medical products.[2]

[2] Dow Corning gratuitously and misleadingly argues that its products have been proven not to cause disease (DCC Br. 5 n.4), but it agreed to a multi-billion dollar settlement at arm's length based on a range of injuries and risks associated with its products, including rupture, product failure, localized injury, and a hotly contested dispute over systemic disease causation. The settlement reflects the parties' assessment of all of these risks and should be enforced fairly according to its terms.

Because Dow Corning wished to fund this amount over time, the scheduled payments (other than the Initial Payment) had to be *increased* by 7% per year to account for the delay, such that when discounted back to the Effective Date they would equal $2.35 billion. *See* RE #714-5, FPA, § 2.01 (payments deemed to be "discounted at the rate of 7% per annum to the Effective Date"). These increased scheduled payments were embodied in the Plan's initial "Annual Payment Ceilings." *Id.*, § 2.01(b). The Plan itself 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 an earlier date" – which reflects the Plan's focus on the need to increase future payments to account for the earning power lost by Dow Corning's desire to pay the settlement amount over time. *See* RE #714-4, Plan, § 1.102 (emphasis added).

The TVC concept, awarding Dow Corning a *credit* for paying certain funds *early*, was created for a limited purpose consistent with this overall scheme: where Dow Corning pays certain categories of insurance proceeds to the Trust (e.g., insurance received pre-Effective Date but paid to the Trust immediately after the Effective Date, and Excess Insurance Proceeds received prior to the end of Funding Period 2), the amounts are to be applied against certain future Annual Payment Ceilings, plus a credit of 7% per year to account for the time value of the

early-paid funds. *See* RE #714-5, FPA, §§ 2.01(a)(ii), 2.03(b).[3] These credits were provided in return for the obligation to contribute insurance proceeds as received, because Dow Corning was giving up the time value of these proceeds earlier than would otherwise be required by the funding schedule. As Dow Corning acknowledges, unlike the Initial Payment, all of these insurance proceeds are to be paid to the Trust post-Effective Date and made immediately available to pay claims. DCC Br. 22 n.14.

The parties recognized that the large reductions in Annual Payment Ceilings that could be necessitated by certain of these adjustments could have a severe impact on the Trust's cash flow during the crucial early years of its operation when most claims would be presented for payment. Therefore, the parties agreed that TVCs triggered by the receipt of Excess Insurance Proceeds (i.e., proceeds above the Annual Payment Ceilings through Funding Period 2) would not be applied immediately, but would be spread out (with 7% annual adjustments) over Funding Periods 5 through 8. *See* RE #714-5, FPA, § 2.03(b). Dow Corning acknowledges that the parties deferred these credits "because of concerns that cash flow during the early years of the Plan might be insufficient to pay claims on a timely basis." DCC Br. 31 n.21. Dow Corning nevertheless argues for a massive, front-loaded

[3] Dow Corning may also theoretically be entitled to TVCs in certain other circumstances not presented here. *See* below at 37-41.

TVC on the Initial Payment that could have dramatically decreased the cash available to pay claims during these crucial early years.

In fact, the FPA specifies very different treatment for the time value of the Initial Payment: the parties agreed that interest on $905 million of the $985 million Initial Payment would accrue *for the benefit of the tort claimants* beginning on the Interest Accrual Date of April 30, 1999, without regard to which escrow account was holding the funds. RE #714-5, FPA, §§ 1.02(b), 2.01(a). This interest is expressly *excluded* in calculating the NPV of Dow Corning's payments and *not* credited towards any Annual Payment Ceiling. *Id.* § 2.01(a). Thus, the earning power of these funds – their *time value* – was assigned to the Trust after that date, eliminating any need, or logical basis, to provide Dow Corning with any type of credit based on when the funds were physically transferred.

Section 7.4 of the Plan separately provided that, if the Effective Date were delayed by appeals challenging the Plan's release provisions or funding caps, Dow Corning would promptly transfer the Initial Payment into an escrow account held by the Trust. These funds were to be held conditionally and returned if confirmation were reversed and could not be used to pay claims. *See* RE #714-4, Plan, § 7.4. Significantly, while the FPA contains detailed provisions specifying how to calculate TVCs based on certain early insurance payments, it contains no parallel provision governing any supposed right to a TVC based on the transfer

into escrow of the Initial Payment pursuant to Plan Section 7.4 – much less the detailed provision spreading out the impact over several years that one would expect to see if such a large, cash-flow-busting credit had been contemplated. This is consistent with the facts that (1) the Initial Payment would not be released unconditionally to the Trust until the Effective Date and (2) in any event, the earning power of the bulk of the Initial Payment from April 30, 1999 had already been assigned to the Trust, eliminating any rationale for Dow Corning to receive a TVC for those funds.

Because a harmonized reading of the Plan and FPA make clear that no TVC was intended for pre-Effective Date transfer of the Initial Payment, Dow Corning repeatedly states that it was *not* obligated to transfer the Initial Payment pending appeal – suggesting that it did so only to accommodate a belated request by the TCC. *See* DCC Br. 9, 17-18. But Section 7.4 was included in the Plan as originally confirmed because it was always understood that the funding caps and the legally aggressive releases sought for Dow Corning's shareholders would likely be challenged and lead to prolonged appeals that could delay the Effective Date for years. The parties specifically agreed that the Initial Payment would be transferred pending such an appeal, and thus obviously understood that this might happen years before the Effective Date. This provision must be read in harmony

with FPA Section 2.01(a), which assigns the time value of the Initial Payment to the Trust after April 30, 1999 without regard to physical custody of the funds.

Dow Corning's statement that it disputed whether the Plan required transfer of the full Initial Payment is supported by nothing in the record and is simply false. Transfer of the full Initial Payment pending appeal was a core benefit bargained for by the TCC and is explicit in the parties' original term sheet.[4] As explained further below, Dow Corning is attempting to conflate this issue with two others that it *did* dispute: whether Section 7.4 had been properly triggered at all by the Bankruptcy Court's initial confirmation rulings, and how much of the transferred funds could be spent on Settlement Facility operations prior to the Effective Date. However, Dow Corning *never* disputed that Section 7.4, once triggered, contemplated transfer into escrow of the entire Initial Payment.

Dow Corning observes that Section 7.4 provided for transfer of "*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]." *See* RE #714-4, Plan, § 7.4 (emphasis added). Dow Corning argues that since the FPA did not itself require transfer of the Initial Payment prior to the Effective Date, neither did Plan Section 7.4. *See* DCC Br. 17-18. But this reading would define "that

[4] The term sheet, which was prepared by Prof. Francis McGovern and endorsed by the parties, is not in the record but could be considered on remand if the point is deemed important.

portion" as "no portion" and render Section 7.4 a nullity. And it would contradict the Disclosure Statement sent to tort claimants, which stated that, pending appeal of a release/funding limitation issue, the Debtor would "pay funds to the Settlement Facility *as provided in Section 7.4 of the Plan*." RE #701-A, Disclosure Statement, p. 98 (emphasis added). Not surprisingly, Dow Corning never before advanced the argument that Section 7.4 imposed no or only a minimal funding obligation – indeed, as demonstrated below, its contemporaneous conduct reflected the opposite understanding.

2. Dow Corning's Subsequent Conduct Confirmed The Plain Language of the Plan Documents

Dow Corning's conduct following confirmation of the Plan but before paying the full Initial Payment into escrow confirmed its understanding that (1) Section 7.4, once triggered, required transfer of the entire Initial Payment and (2) the parties had agreed to assign the time value of the Initial Payment to the Trust going forward from the Interest Accrual Date, wherever the funds physically resided. If Dow Corning believed that it was entitled to a TVC based on funding the Initial Payment in advance of a delayed Effective Date, then its conduct during this period was irrational.

The Bankruptcy Court initially confirmed the Plan in November 1999 but then issued a second decision, in December 1999, that purported to eliminate the nonconsensual shareholder release imposed by the Plan against dissenting

creditors. *See In re Dow Corning Corp.*, 244 B.R. 721 (Bankr. E.D. Mich. 1999), *aff'd in part and rev'd in part*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002). Numerous parties appealed confirmation without obtaining a stay, triggering Dow Corning's obligation, pursuant to Plan Section 7.4, to escrow the Initial Payment pending appeal. However, citing the adverse ruling on the release issue (which Dow Corning and the TCC had separately appealed), Dow Corning took the position that Section 7.4 had not yet been triggered and therefore declined to transfer the funds.

However, even when the District Court reversed the Bankruptcy Court's release ruling in November 2000, thereby ordering the Plan confirmed as written, Dow Corning continued to resist transferring the Initial Payment into escrow. Over a period of several months, Dow Corning funded only approximately $330 million of the Initial Payment, despite repeated requests and even litigation threats from the TCC. Significantly, however, Dow Corning did *not* articulate as a ground for this delay that Section 7.4 did not apply to the entire Initial Payment.

On August 29, 2001, under mounting pressure from the TCC to transfer the remainder of the Initial Payment, Dow Corning's counsel wrote to the Court to explain its reasons for delay. *See* RE #731-3, CAC Resp., Ex. A (under seal), Letter from George H. Tarpley to Honorable Denise Page Hood, dated August 29, 2001. The August 29 letter did not deny Dow Corning's legal obligation to

transfer the entire Initial Payment into escrow, but argued that funds already transferred were sufficient for start-up operations of the Settlement Facility; that the rest of the money was already held in managed escrow accounts; and that transferring the additional $700 million to the Trust would create unnecessary investment and reporting expense. *See id.* at 1-2.[5]

After several more weeks of negotiations, Mr. Tarpley wrote to TCC counsel Kenneth H. Eckstein on September 19, 2001 to propose a schedule on which Dow Corning would perform its existing obligation to fund the balance of the Initial Payment. *See* RE #731-4, CAC Resp., Ex. B (under seal), Letter from George H. Tarpley to Kenneth H. Eckstein, dated September 19, 2001. Among other things, the September 19 letter proposed to *change* the Plan documents to provide for the first time that "[t]he pre-Effective Date funding of the Initial Payment and the interest and net earnings thereon (excluding the interest and net earnings [on $905

[5] Dow Corning objected below to admission of this and other contemporaneous letters, and Judge Hood never ruled on admissibility because she found it unnecessary to consider extrinsic evidence. If this Court determines that the Plan documents are ambiguous, this letter may be considered under Federal Rule of Evidence 408, because it represents a communication with the District Court rather than a confidential negotiation, and is offered not to prove the merits of any disputed claim but to show that Dow Corning understood it would not reap a huge economic benefit by transferring the Initial Payment as required by Section 7.4. Significantly, Dow Corning proffered *no* evidence below suggesting that it (1) did not believe that Section 7.4 generally required transfer of the entire Initial Payment, or (2) believed, despite resisting transfer of most of the Initial Payment, that such transfer would provide it with a credit of approximately $65 million per year.

million of the Initial Payment]) shall be counted as part of the Net Present Value Calculation under the Plan." *See id.* at 3.[6] Dow Corning was unsuccessful in renegotiating the deal, as shown by the simplified draft replacement letter that Dow Corning submitted a few days later, on September 24, 2001, which set forth a payment schedule without the new language altering the TVC provisions. *See* RE #731-5, CAC Resp., Ex. C (under seal), Letter from George H. Tarpley to Kenneth H. Eckstein, dated September 24, 2001. This schedule was eventually incorporated in substance in the amended Depository Trust Agreement ("DTA"). *See* RE #714-16, DTA, § 4.01(a).

Contrary to Dow Corning's suggestion (DCC Br. 40), the amended DTA did not characterize the transfers constituting the Initial Payment as reflecting "acceleration." To the contrary, it referred to those payments as having been made "in accordance with Section 7.4 of the Plan" – confirming that Section 7.4

[6] Dow Corning's recitation in the letter that nothing in the proposal "alters or modifies the manner of calculating Net Present Value in the Plan" (Ex. B., ¶ 8) was a familiar gambit to minimize the significance of its demand and the likelihood that it would be deemed a Plan modification, but the letter seeks imposition of a TVC never mentioned anywhere in the Plan documents. Again, this letter would be admissible under Rule 408 because it is offered not to prove the merits of a claim then in dispute, but to show Dow Corning's understanding that it did not yet have the right to a TVC for performing its obligations under Plan Section 7.4.

contemplated transfer of the full Initial Payment. RE #714-16, DTA, § 4.01(a).[7] The final version of the FPA similarly stated that "[p]ursuant to Section 7.4 of the Plan, Dow Corning has made an initial payment of $985,000,000." RE #714-5, FPA, § 2.01(a).

As explained further below, while Dow Corning *never* advanced the argument that Plan Section 7.4 did not apply to the entire Initial Payment, its persistent reluctance to fund the Initial Payment confirms its contemporaneous understanding that transfers into conditional escrow did not trigger a TVC and that the time value of the funds involved had already passed to the tort claimants and would not be restored to Dow Corning as a result of transferring the funds from its own escrow account to one held by the Trust. Moreover, the attempt to negotiate a *change* in the Plan documents to provide a TVC for transferring the Initial Payment prior to the Effective Date confirms Dow Corning's understanding that it did not already have that right under the existing Plan documents.

Appeals challenging the Plan's release provisions spanned several years, and the Plan ultimately went effective on June 1, 2004. Dow Corning reaped a huge benefit from this delay: $2.35 billion paid on June 1, 2004 has an NPV of only approximately $1.63 billion discounted back to December 31, 1998 (when the Plan

[7] Nor did the DTA specify that this non-existent acceleration would not "alter[] or modif[y]" the TVC provisions; rather, that boilerplate statement was made in a different subsection and referred to the entire DTA. *Id.* § 4.01(c).

was first negotiated). In other words, if Dow Corning were now required to fund $2.35 billion NPV *as of December 31, 1998*, it would be obligated to supply vastly more nominal dollars before hitting the funding cap. Dow Corning's attempt to augment this benefit by claiming a TVC merely for transferring funds into a restricted pre-Effective Date escrow, and to re-trade the compromise that assigned the earning power of the Initial Payment to the tort claimants as of a date certain, was properly rejected below.

B. Proceedings Below

Dow Corning moved before the District Court on January 8, 2010 seeking TVCs in connection with eight different categories of payments that would have the effect of reducing the NPV funds available to pay claims in the Settlement Facility by approximately $370 million. *See* RE #714, 1/8/10 Motion; RE #714-3, Hinton Decl. Att. E. The CAC opposed the motion in part, focusing on the TVC claimed for the Initial Payment, which accounts for approximately $230 million of the claimed $370 million credit. *See* RE #714-3, Hinton Decl. Att. E; RE #730, CAC Resp., pp. 11-18. The CAC agreed that Dow Corning was entitled to TVC adjustments for its payment to the Trust of insurance proceeds received prior to the Effective Date and through Funding Period 2, objecting only to the extension of the TVC for the first category beyond the start of Funding Period 1 in violation of the plain language of the FPA, as well as to a series of smaller claimed TVCs not

provided for in the Plan documents. RE #730, CAC Resp., pp. 19-20. The CAC thus supported approximately $100 million of the approximately $140 million in TVCs claimed for items other than the Initial Payment. *See* RE #714-3, Hinton Decl. Att. E (describing TVC of approximately $82 million for Excess Insurance Proceeds and $15 million for TVC for pre-Effective Date insurance until beginning of Funding Period 1).

On November 28, 2011, the District Court issued its decision granting in part and denying in part Dow Corning's claimed relief. RE #836, 11/28/11 Order. The court held that Dow Corning was entitled to TVCs in connection with the two large categories of insurance expressly addressed in the FPA but otherwise denied the motion based on its reading of the plain language of the Plan documents, which it found to be unambiguous. *Id.* p. 16.

More specifically, the District Court approved, with the CAC's support, TVCs in connection with more than $211 million in "Early Insurance Proceeds" (insurance received prior to the Effective Date and paid to the Trust after the Effective Date) (*id.* p. 11-12) and more than $214 million in "Excess Insurance Proceeds" (proceeds received in excess of any payment ceiling between the Effective Date and the end of Funding Period 2), which receive a TVC spread out over Funding Periods 5 through 8. *Id.* p. 13-15. With respect to Early Insurance Proceeds, the court permitted a TVC extending to the beginning of Funding Period

1, and to the extent that the amount remaining to be credited (including the TVC) exceeded the Period 1 cap, permitted the remaining amount to be charged against Period 2 – but without the additional TVC on that roll-over that Dow Corning had sought. *Id.* p. 12. The Court cited the plain language of FPA Section 2.01(a)(ii), which specifies the method for calculating the TVC for pre-Effective Date insurance.

The District Court otherwise denied Dow Corning's claimed TVCs as lacking any basis in the Plan documents. On the Initial Payment issue, the court agreed with the CAC that there was no logical or textual basis in the Plan documents for Dow Corning to receive a TVC for Initial Payment transfers that were merely "held in escrow *pre*-Effective Date" rather than contributed as unrestricted cash *post*-Effective Date but ahead of the payment schedule, as was the case with categories of payments expressly accorded a TVC under the FPA. *See id.* p. 9. The court stressed that there was no reference to such a TVC for escrowed funds anywhere in the Plan, FPA, or DTA and that the parties had separately agreed that the interest earned on the Initial Payment after April 30, 1999 would be transferred to the Trust in addition to the Initial Payment (*id.* p. 10) – thereby recognizing the centerpiece of the CAC's opposition to the claimed Initial Payment TVC.

The District Court also denied Dow Corning's requests for the series of smaller TVCs aggregating approximately $10 million, based on payments of (a) $18.4 million of insurance proceeds distributed directly to Class 6D Australian claimants ahead of the Effective Date; (b) $7.2 million paid directly to Class 4A claimants (prepetition judgment creditors) after the Effective Date; (c) $2.9 million paid from Dow Corning's MDL 926 escrow account to the MDL 926 Settlement Facility; (d) approximately $2 million transferred from Dow Corning's MDL 926 account to the Trust; (e) approximately $57 million in insurance proceeds received during Funding Period 3. *Id.* p. 9-13, 15.

The District Court held that none of these payments triggered a TVC adjustment under the Plan or FPA. The court noted that TVCs are expressly mentioned only in "certain sections of the FPA" and that "[t]he parties knew to use the term at those sections" and would have provided expressly for TVCs for additional categories of payments if they had so intended. *Id.* p. 13. The court thus concluded that "[t]he parties are clear in their intent that only certain funds are allowed Time Value Credit." *Id.* p. 16. The court rejected as "speculative" and premature Dow Corning's argument that failing to read into the Plan documents an intent to grant a TVC for every payment would necessarily result in payments exceeding the $2.35 billion NPV funding cap. The court noted that the Claims

Administrator had not yet finally calculated adjustments to the Annual Payment Ceilings. *Id.*[8]

SUMMARY OF ARGUMENT

Dow Corning is not entitled to a TVC with respect to the Initial Payment for two reasons based on the plain language of the Plan documents: *First*, the transfer of the Initial Payment into escrow pre-Effective Date did not constitute an unconditional "payment" to the Trust until the Effective Date, when such funds were released to be used for the benefit of the tort claimants. *Second*, the terms of the Plan documents show that the parties bargained for the time value of the Initial Payment to go to the Trust starting from the Interest Accrual Date – in the form of Dow Corning's actual earned interest from 1999 until the Initial Payment was escrowed in 2001, and through the Trust's own earnings thereafter. Dow Corning's attempt to take back the time value of the Initial Payment for the 2001-2004 period is inconsistent with the deal struck in the Plan documents and inherently illogical, because it would mean that tort claimants would have been

[8] The District Court no doubt also understood that the precise calculation of the adjusted Annual Payment Ceilings is likely to be a moot issue if the court's decision is upheld with respect to the treatment of the Initial Payment, because that would provide enough of a cushion within the $2.35 billion NPV funding cap to pay all contemplated claims, including Premium Payments for which settling breast implant claimants have been waiting for years, without coming close to the cap. *See* RE #730, CAC Resp., pp. 3-4.

better off simply leaving the Initial Payment in Dow Corning's hands, earning interest for the benefit of the Trust, until the Effective Date.

Even if the Plan documents were deemed to be ambiguous, Dow Corning's own conduct in performing under the Plan confirms the parties' intent. Although Plan Section 7.4 specifically required transfer of the Initial Payment pending an appeal on the release issue, Dow Corning resisted transmitting the funds for nearly two years, eventually agreeing only to piecemeal payments under pressure (including litigation threats) from the TCC. If Dow Corning really believed that by funding the Initial Payment into an escrow account held by the Trust prior to the Effective Date it would receive a TVC of more than $65 million per year, rather than resisting it would have demanded that the Trust take the money in 1999. In addition, Dow Corning's unsuccessful attempt to re-negotiate the terms of the Plan to provide for a TVC on the Initial Payment confirms its contemporaneous understanding that it did not, under the existing Plan documents, already have the right to a TVC based on the timing of the Initial Payment.

The District Court correctly granted the bulk in dollar amount of Dow Corning's other claimed TVC adjustments, with the concurrence of the CAC. These credits concern more than $400 million in insurance proceeds paid unconditionally to the Trust *after* the Effective Date but ahead of the designated funding schedule – precisely the circumstances in which the Plan documents

provide for TVCs. The District Court correctly denied a series of other, smaller adjustments that Dow Corning claimed in circumstances not provided for under the Plan documents. Dow Corning's concern that denial of such credits may result in total payments exceeding the $2.35 billion NPV cap is premature. Because the Trust has not yet spent down the Initial Payment plus insurance funds paid in as received, there has been no need yet to draw on the remaining Annual Payment Ceilings, which have been rolling forward unused. There is no indication in the record that total payments necessary to fund the Settlement Facility will threaten to exceed the NPV cap, and thus Dow Corning's concerns in this regard may never need to be addressed.

STANDARD OF REVIEW

This Court has traditionally reviewed decisions interpreting a confirmed plan under an "abuse of discretion" standard. *See In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). Dow Corning itself has advocated for that standard of review in connection with appeals of earlier District Court decisions in this case. *See* Brief of Appellee at 12, *Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633 (6th Cir. Dec. 23, 2008) ("The District Court's decision here was based on the plain language of Dow Corning's Amended Joint Plan of Reorganization. It is therefore reviewed for an abuse of discretion and must be accorded 'significant deference.'") (citation omitted).

This Court adopted a slightly different standard in *In Dow Corning Corp. v. Claimants' Advisory Committee (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769 (6th Cir. 2010). The Court acknowledged that, while Judge Hood was not the judge who confirmed the original Plan, she "has presided over this bankruptcy case continuously since 1995" in various capacities and has "acted as the court of first resort" for nine (now eleven) years. *Id.* at 772. As a result, "[t]here is simply no denying that she is much more familiar with this Plan – and with the parties' expectations regarding it – than we are," leading the Court to accord her reading of the Plan documents "a measure of deference." *Id.* The Court concluded that it would accord relatively less deference to the District Court's interpretation of unambiguous Plan language and relatively more to its weighing of extrinsic evidence. *Id.* This appeal again deals with the interpretation of Plan document provisions with which Judge Hood is familiar from her participation in the Confirmation Hearing and her administration of the case over many years, and the Court thus should apply at least the same intermediate deference it accorded the District Court's decision in connection with the 2010 appeals.

ARGUMENT

I.

DOW CORNING'S ATTEMPT TO CLAIM A TIME VALUE CREDIT FOR ITS CONDITIONAL TRANSFER OF THE INITIAL PAYMENT INTO ESCROW IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE PLAN DOCUMENTS, ATTEMPTS TO RE-TRADE A KEY COMPROMISE UNDER THE PLAN, AND IS BELIED BY ITS OWN CONDUCT IN PERFORMING UNDER THE PLAN

Dow Corning's attempt to claim a TVC based on having funded the Initial Payment ahead of the Effective Date, as required by the Plan, fails on multiple grounds. The District Court's rejection of this claim should be affirmed.

A. The Plan Documents Provide No TVC For Transferring the Initial Payment Into Conditional, Restricted Escrow Prior to the Effective Date

Interpretation of a confirmed reorganization plan is analogous to construction of a contract and governed by similar principles. *See In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). Thus, the Plan and related documents should be interpreted according to their plain language consistent with their purposes and in a manner that harmonizes all terms. *See, e.g.*, *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009) (contract interpreted consistently with relative positions and purposes of parties); *Diversified Energy, Inc. v. Tenn. Valley Auth.*, 223 F.3d 328, 339 (6th Cir. 2000) (contract should be read as coherent and consistent whole that gives meaning to all terms).

Dow Corning is not entitled to a TVC in connection with the Initial Payment for the simple reason that the plain language of the Plan and Plan documents do not provide for it. As discussed below at 28-33, the Plan documents reflect several reasons why the parties could not have intended to provide for the claimed credit in light of the agreement in the FPA to assign the earning power of the Initial Payment to the Trust as of the Interest Accrual Date.

More fundamentally, however, no TVC should attach to the Initial Payment because it should be deemed to have been actually "paid" not at the time it was transferred conditionally into escrow, but only later when the conditions were satisfied by resolution of the appeals, title fully vested in the Trust, and the funds were made generally available to pay claims – i.e., on the Effective Date.

This reading of the Plan follows from New York law, which governs the FPA. *See* RE #714-5, FPA, § 5.08. For property to be transferred into trust, there must, among other things, be "actual delivery of the fund or property, with the intention of vesting legal title in the trustee." *In re Doman*, 890 N.Y.S.2d 632, 634 (App. Div. 2d Dep't 2009); *see also Brown v. Spohr*, 73 N.E. 14, 16-17 (N.Y. 1904) (same). In contrast, placing property in escrow subject to conditions does not convey title; ownership does not pass until the condition is satisfied. *See Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 659 (2d Cir. 1996) (citing New York law).

Here, pursuant to Plan Section 7.4, Dow Corning transferred the Initial Payment into escrow ahead of and in preparation for the Effective Date, but with important strings attached that precluded the vesting of unconditional title to the funds. The transfers were subject to the condition that the funds be returned (with all interest) if Plan confirmation were overturned. Crucially, the funds were not made available to the Trust to pay tort claimants, but had to be maintained pending the Effective Date in restricted, segregated escrow accounts. These accounts could be accessed only to draw certain agreed upon amounts to fund start-up operations of the Settlement Facility. These funds could *not* be paid to tort claimants, and the expenditures would have benefitted Dow Corning even in the event confirmation was reversed by putting into place the administrative structure to process claims under any subsequent settlement.

In addition to protecting Dow Corning's reversionary interest in the funds until appeals were exhausted, this escrow structure conformed to the general rule that prepetition claims should not be paid until a plan of reorganization is implemented. *See Ohio Dep't of Taxation v. Swallen's, Inc. (In re Swallen's, Inc.)*, 269 B.R. 634, 638 (B.A.P. 6th Cir. 2001) (Bankruptcy Code "'does not authorize the payment in part or in full, or the advance of monies to or for the benefit of unsecured claimants prior to the approval of the plan of reorganization'") (quoting *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir.

1987)). Here, the Plan was not implemented or consummated, within the meaning of 11 U.S.C. §1142, until all appeals were resolved and the Effective Date occurred. Before then, Dow Corning was not a Reorganized Debtor and the Plan and its accompanying documents were not yet operative, and as a result the escrowed funds were not available to pay claims as a matter of both law and contract.[9]

In short, only on the Effective Date, when the Plan was finally implemented, the conditions attached to the escrow were satisfied, and the funds were finally released to the Trust unconditionally to pay claimants, could the Initial Payment be considered "*paid*." This is one reason why the Plan documents made no mention of any TVC for pre-Effective Date transfers into escrow. Indeed, the "payment" for which Dow Corning here claims credit represented merely the shifting of funds from escrow accounts managed by Dow Corning to others managed by the Trust – an event without economic significance, since the funds were already isolated from Dow Corning's operating cash and the actual earnings of the funds had in any event been assigned to the Trust. *See* above at 8. Unlike the post-Effective Date

[9] Dow Corning has observed that $18.4 million was paid directly by an insurer prior to the Effective Date to effectuate a settlement with Class 6D Australian claimants. Despite this limited exception, implemented without the involvement of the TCC, Dow Corning cannot dispute that the parties' contract mirrored the general rule that prepetition claims cannot be paid until a reorganization plan goes into effect.

funding of insurance proceeds, this transfer did not make funds freely available to the Trust for the earlier use and benefit of tort claimants. In any meaningful sense, the Initial Payment was not *paid* under the Plan until the Effective Date, and thus no TVC adjustment is warranted.

B. Providing Dow Corning With a TVC for the Initial Payment Would Vitiate the Agreement to Assign the Time Value of the Initial Payment to the Trust

Even if the transfer of the Initial Payment into restricted escrow constituted a "payment" for Plan funding purposes, providing Dow Corning with a TVC for this transfer would undo a core bargain reflected in the basic terms of the Plan documents. As described above, Dow Corning received the benefit of having the date used to determine the NPV of its settlement payments float forward until the Effective Date, thereby significantly reducing the total value of the settlement to tort claimants, who also agreed to accept fixed settlement amounts that would not be increased to reflect that delay. In return, the parties agreed in FPA Section 2.01 that the Trust, not Dow Corning, would have the benefit of the earning power of the Initial Payment after the Interest Accrual Date in 1999 – by obtaining the actual interest that Dow Corning earned prior to the transfer of the Initial Payment (with such amounts *excluded* from the $2.35 billion NPV calculation) and by having the money to invest itself thereafter. This benefit would be largely wiped out if Dow

Corning separately received a TVC for escrowing the Initial Payment in advance of the Effective Date.

Dow Corning's claim that the Plan did not originally contemplate transfer of the Initial Payment pending appeal (DCC Br. 9, 18) appears intended to set up an argument that the relief Dow Corning now seeks is merely an artifact of an unanticipated demand by the TCC. However, Section 7.4 was always in the Plan, and it was always understood to require (once it was triggered) that the entire Initial Payment be escrowed pending appeal. *See* above at 8-11. Section 7.4 therefore must be read in harmony with the FPA provisions shifting the time value of the Initial Payment to the Trust after the Interest Accrual Date. Plan Section 7.4 cannot have been intended to undo the bargain struck in FPA Section 2.01, by taking back for Dow Corning the very thing it had granted to tort claimants: the time value of the Initial Payment after April 30, 1999.[10]

If the parties had intended for the limited, insurance-related TVC provisions to apply to the Initial Payment in the (anticipated) event the Effective Date were delayed, they would have expressly said so in the FPA. Having specifically

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[10] Dow Corning argued below that, because the FPA does not expressly state that no TVC attaches to the Initial Payment, the bargain described above cannot be found in the Plan documents. *See* RE #736, Dow Corning Reply, p.2. But the trade-off between the time value provisions favoring Dow Corning and the specific carve-out awarding interest on the Initial Payment to the tort claimants is apparent on the face of the Plan documents, which were heavily negotiated and defended at confirmation and on appeal as a comprehensive set of interrelated compromises.

included carefully worded provisions to govern the other circumstances in which large early payments might trigger a significant TVC, the parties should be presumed to have acted intentionally in excluding similar language providing a TVC based on early transfer of the Initial Payment. *See Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 989 (Fed. Cir. 2009) (interpreting New York law) ("Where one provision of an agreement contains a particular reference, the omission of this reference from any similar provision 'must be assumed to have been intentional under accepted canons of contract construction.'") (quoting *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233 (1986)).

Moreover, the TVC provisions have a specific purpose inapplicable to the Initial Payment: to compensate Dow Corning for the time value of funds provided ahead of the funding schedule. There is no corresponding reason to provide a TVC based on the timing of the Initial Payment, because Dow Corning had *already given up* the right to the time value of most of the Initial Payment as of the Interest Accrual Date, *whether or not the Initial Payment had yet been paid to the Trust*.

Dow Corning tries to distinguish between the *interest* on $905 million of the Initial Payment, which it concedes it bargained to exclude from the funding cap and NPV calculations (DCC Br. 39), and the time value of the Initial Payment itself, for which it illogically still claims a TVC. But the interest *is* the time value

of the funds. Dow Corning's argument makes a travesty of a doctrine that its own expert called a "fundamental principle in economics and finance" (RE #714-3, Hinton Decl., ¶ 14) by suggesting that two parties can simultaneously enjoy the time value of the same money.

As Dow Corning itself argues (DCC Br. 34, 35), the Plan documents should be read to reach a sensible rather than absurd result, consistent with the parties' purposes. Had Dow Corning's current argument been anticipated, the TCC obviously would never have agreed to permit a TVC based on the timing of receipt of the Initial Payment, since that would wipe out the benefit of the Interest Accrual Date bargain. Moreover, given the potentially devastating impact on the Settlement Facility's ability to draw down needed funds, if such a credit had been contemplated, it would have been postponed until later funding periods, as in the Excess Insurance Proceeds provision, FPA Section 2.03(b). The absence of any such provision demonstrates that the parties simply never contemplated that Dow Corning could claim a massive TVC based on the timing of the Initial Payment, even if pre-Effective Date escrow transfers could *ever* be considered "payments" in this regard.

Imposing such a credit now would be grossly unfair. The long delay in implementing the Plan relieved Dow Corning of the obligation to make scheduled payments for five years. The delay of the Effective Date also meant money out of

the pocket of every claimant because the Plan does not adjust individual settlement amounts to account for cost of living increases. The passage of time further benefited Dow Corning by making it more difficult for aging claimants to assemble medical records and establish their entitlement to benefits, and indeed many claimants have died in the interim or otherwise stopped responding to Settlement Facility communications. The TCC bargained to offset the harms of delay by ensuring that the Trust would own the time value of the Initial Payment after the Interest Accrual Date, *whenever* the funds were transferred – thereby creating a larger pool of funds to assure payment of all base and premium claims. Giving Dow Corning a TVC on the Initial Payment would largely eliminate that bargained-for benefit.

Under Dow Corning's construction of the FPA, the tort claimants would have been better off *waiving* Dow Corning's obligation to fund the Initial Payment prior to the Effective Date – allowing interest to accrue for the claimants' benefit while the funds remained in Dow Corning's possession. For example, had interest accrued on the funds in Dow Corning's hands at 5% per year over the five years, compounded annually, the Initial Payment transferred on the Effective Date would have included some $250 million in interest expressly *excluded* from the NPV calculation, considerably augmenting the value of the settlement. In such circumstances, Dow Corning could not conceivably have claimed a TVC. It

cannot be that, by funding the Initial Payment as required by the Plan, Dow Corning *regained* the right to the earning power of these funds that it had already given up.

In short, the provision requiring transfer of the Initial Payment pending the Effective Date could not have been intended to have economic significance because the tort claimants already had the right to the earnings of the funds. Dow Corning's attempt to leverage Section 7.4 for its economic benefit would destroy a key element of the parties' bargain and was properly rejected below.

C. Parol Evidence of Dow Corning's Contemporaneous Conduct Confirms the Plain Language of the Plan Documents

As demonstrated above, a rational reading of the Plan documents consistent with the parties' purposes bars Dow Corning from claiming a TVC based on the timing of the Initial Payment. But even if the Court were to determine that the applicable Plan provisions were ambiguous, requiring consideration of extrinsic evidence of intent to establish their meaning, the understanding expressed by Dow Corning's conduct under the Plan would lead to the same result. *See Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006) (contract construed to effectuate expressed intent of parties in light of circumstances and object of contract). Moreover, contemporaneous evidence of the parties' understanding in performing the contract is persuasive in establishing its intended meaning. *See, e.g.*, *Roger*

Miller Music, Inc. v. SONY/ATV Publ'g, LLC, 477 F.3d 383, 393 (6th Cir. 2007) (court will adopt interpretation of contract placed on it by parties' acts); *A. L. Pickens Co. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 120 (6th Cir. 1981) (parties' construction of contract "best evidenced by their conduct" (citation omitted)).[11]

Here, Dow Corning's actual conduct following Plan confirmation is consistent with the CAC's reading of the Plan, but would be irrational if Dow Corning believed that it was entitled to a TVC based on the timing of the Initial Payment. Such evidence of the construction placed upon a contract before the controversy as to its meaning arose is highly persuasive. *See Pyramid Operating Auth., Inc. v. City of Memphis (In re Pyramid Operating Auth., Inc.)*, 144 B.R. 795, 817 (Bankr. W.D. Tenn. 1992) ("The terms of an agreement are better shown by the parties' acts thereunder while harmonious and practical construction reflects their intention, than by inconsistent construction contended for when subsequent

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[11] The Court may affirm the District Court's ruling on this alternative ground. *See Dixon v. Clem*, 492 F.3d 665, 673 (6th Cir. 2007) (district court decision may be affirmed on any ground presented in the record); *see also In re Dow Corning*, 456 F.3d 668, 677 (6th Cir. 2006) (rejecting Bankruptcy Court's holding that plain language was unambiguous but upholding its construction as reasonable, while remanding on other issues). Remand for weighing of the extrinsic evidence is unnecessary because Dow Corning offered no evidence to support its suggestion of a contemporaneous understanding that pre-Effective Date transfer of the Initial Payment pursuant to Section 7.4 was intended to generate a TVC despite the agreement to assign the time value of $905 million of the Initial Payment to the Trust starting from April 30, 1999.

differences have compelled the parties to resort to law.") Two aspects of Dow Corning's conduct demonstrate its contemporaneous understanding.

First, as described above at 11-16, Dow Corning resisted for months the TCC's repeated calls for it to escrow the full Initial Payment, even after any doubt as to its obligation was eliminated by this Court's November 2000 decision upholding the release provisions. Dow Corning never offered a legal ground for its foot-dragging; it merely argued that the transfer was unnecessary and would give rise to extra costs. Had Dow Corning believed at the time that it would receive a TVC of more than $65 million per year pending the Effective Date, it would have cheerfully transferred the funds – indeed, it would have insisted on doing so promptly after Plan confirmation, because the Interest Accrual Date, the point at which it could no longer derive any benefit from holding and investing the funds, had passed. It is obvious that, to the contrary, Dow Corning understood that the time value of the Initial Payment belonged to the tort claimants and that it would reap no benefit from an early transfer of the funds to the Trust's escrow accounts.

Second, Dow Corning's attempt to renegotiate the FPA in 2001 to include a TVC based on pre-Effective Date transfer of the Initial Payment (even while it pretended that this demand did not change anything) further confirms its understanding that the Plan documents did not already provide for such a credit. When the TCC rejected this attempt to renegotiate the deal, Dow Corning funded

the balance of the Initial Payment without obtaining any material change in the Plan documents. *See* above at 13-14. Dow Corning's second attempt to re-cut the deal and give itself a TVC for the Initial Payment was correctly rejected below.

II.

CERTAIN OTHER OF DOW CORNING'S CLAIMED CREDITS SHOULD BE REJECTED BECAUSE THEY ARE NOWHERE PROVIDED FOR IN THE PLAN DOCUMENTS

Contrary to Dow Corning's suggestion, the Plan documents contain no general statement that *all* payments made ahead of the funding schedule automatically trigger a TVC to the next applicable Annual Payment Ceiling. To the contrary, the FPA reflects a series of specific choices as to when, and how, to recognize and account for payments made ahead of the presumptive payment schedule.

For example, the FPA sets forth in Sections 2.01 and 2.02 the treatment of certain specific categories of insurance proceeds entitled to immediately credited TVCs. Section 2.03, in turn, prescribes the treatment of Excess Insurance Proceeds, which are credited (along with corresponding TVCs) only against the ceilings in Funding Periods 5 through 8. And Section 2.05(a) describes a mechanism to adjust the time value of all payments at the conclusion of the 16-year facility to determine how much funding remains available under the $2.35 billion cap to pay the final allowed claims. This scheme confirms an intention to

protect cash flow by providing immediate adjustments only for certain specific types of accelerated payments and leaving for later calculation and credit adjustments that may be necessitated by other payments.

Dow Corning stresses the importance of the Section 2.05(a) "true-up" provision as a necessary mechanism to ensure enforcement of the funding cap (*see* DCC Br. 29), but no issue is yet presented regarding the operation of this provision, which will not be implicated or triggered until *after* Funding Period 16, in the year 2022. When the Motion was made in January 2010, significant unspent funds remained in the Trust. RE #714-6, Dow Corning Qualified Settlement Trust Fund Month Ended September 30, 2009 Report of the Financial Advisor, Schedule 4 (under seal). Until those funds are spent down, unused annual ceiling amounts roll forward each year with 7% interest. As a result, and even crediting Dow Corning's claimed TVCs, hundreds of millions of dollars in unused payment ceilings remain available to pay claims. RE #714-3, Hinton Decl., Att. D. Dow Corning has not yet been called upon to pay any funds other than the Initial Payment and insurance paid to the Trust as received, and there is no evidence that the funding ultimately required to pay all claims will threaten to exceed the $2.35 billion NPV cap. Thus, construction of Section 2.05 may prove to be academic.

The District Court thus correctly focused on the plain language of the Plan documents to determine which specific payments trigger TVCs that Dow Corning

is entitled to have applied now to the calculation of Annual Payment Ceilings, rather than potentially later in connection with the "true-up." The District Court granted a TVC of approximately $82 million, to be applied in Funding Periods 5 through 8, in connection with the payment of Excess Insurance. The court also approved approximately $15 million out of an approximately $48 million TVC claimed for pre-Effective Date insurance paid to the Trust within 90 days after the Effective Date, holding, consistent with the plain language of FPA Section 2.01(a)(ii), that the TVC be carried forward only to the beginning of Funding Period 1, although any unused portion (without an additional TVC added on) could be rolled forward to Funding Period 2. *See* above at 17-18; RE #714-3, Hinton Decl., Att. E.

Dow Corning cannot dispute that this ruling tracks the plain language of the FPA, which expressly states that the TVC is calculated "until the beginning of Funding Period 1." RE #714-5, FPA, § 2.01(a)(ii). It simply argues that an additional TVC on any excess carried forward to other funding periods is necessary to maintain the precision of the time value calculation, but as noted the Plan documents do not expressly require that credits reflecting all payments be applied as soon as they are earned. Credits for Excess Insurance are expressly postponed to Funding Periods 5 through 8, and other adjustments not specifically authorized may be recognized in the final "true-up" under Section 2.05, but that

does not mean that the plain language of the Plan documents should be distorted to provide contemporaneous adjustments that are not specifically authorized. The District Court's application of the plain language of the FPA to limit the credit claimed for pre-Effective Date insurance proceeds was neither an abuse of discretion nor clear error, and should be affirmed.

The District Court's other rulings rejecting an aggregate of approximately $10 million in other credits should also be affirmed.

First, the District Court correctly rejected Dow Corning's attempt to claim a TVC for the $18.4 million paid by American International Underwriters ("AIU") to fund the Class 6D Settlement pre-Effective Date. *See* DCC Br. 11, item 2. This payment was made as the result of a settlement between AIU and Australian counsel to which the TCC was not a party and, unlike early-funded insurance paid *into* the Settlement Facility *after* the Effective Date, this payment did not generate interest income for the benefit of tort claimants. Thus, Dow Corning properly gets a credit for the principal amount of the settlement, but not a TVC based on its timing. The provision Dow Corning cites as supposed authority for this TVC (FPA Section 2.10(c)) is inapposite; it concerns a situation in which the Settlement Facility is unable to meet its funding obligations to the Class 6D trust and Dow Corning is required to make up the shortfall during the first 90 days *after* the

Effective Date. This situation did not occur and thus this provision is simply inapplicable.

Second, the District Court correctly rejected Dow Corning's claims for several small TVCs in connection with non-insurance payments, *i.e.*, the $2.9 million paid to the MDL 926 Settlement Fund (*see* DCC Br. 11, item 4); the more than $2 million net amount transferred from MDL 926 (*id.*, item 5); and the $7.2 million paid directly to Class 4A claimants in June 2004 (*id.*, item 6). Again, there is no provision in the FPA or any other Plan document authorizing a TVC in connection with the payment of these funds. Had the parties intended for such TVCs in connection with non-insurance payments, they would have provided for them in the FPA. Whether a subsequent time value adjustment for these payments would be appropriate after Funding Period 16 pursuant to FPA Section 2.05 is a question not yet presented for decision.

Finally, the claimed TVC for insurance proceeds received in Funding Period 3 (*see* DCC Br. 12, item 8) is an example of pure bootstrapping. The definition of Excess Insurance Proceeds is expressly limited to proceeds received before the end of Funding Period 2. *See* RE #714-5, FPA, § 2.03(a). Thus, Dow Corning would be entitled to a TVC for insurance proceeds received and paid to the Trust during Funding Period 3 *only* if it could demonstrate that "the total amount of cash and Insurance Proceeds received" during that period exceeded the

adjusted Annual Payment Ceiling. *Id.* § 2.02(d). Dow Corning claims a TVC of approximately $2 million based on paying approximately $57 million to the Trust during Funding Period 3, when the nominal Annual Payment Ceiling was $374 million. The *adjusted* payment ceiling would be less than $57 million – and Dow Corning would be entitled to a TVC – only if it separately prevailed in enforcing a TVC for transferring the Initial Payment into escrow. *See* RE #714-3, Hinton Decl., Att. D. As demonstrated above in Point I, the District Court properly denied that TVC, leaving an ample adjusted Annual Payment Ceiling for Funding Period 3 to absorb the insurance received during this period without the need to roll the credit forward to Funding Period 4 with a TVC. The District Court correctly denied this claimed credit.[12]

[12] Through Funding Period 2, Dow Corning had paid cash and insurance totaling $1.442 billion, of which $214 million was Excess Insurance Proceeds not credited until Funding Periods 5 through 8. That left approximately $1.228 billion to be credited against approximately $1.135 billion in available funding ceilings (the $985 million Initial Payment plus $47 million and $103 million, respectively, for the first two funding periods). Only approximately $93 million in payments remained to credit against the Funding Period 3 ceiling of $374 million – leaving ample room for all undisputed TVCs as well as the $57 million in insurance actually received during this period. *See* RE #714-3, Hinton Decl., Att. D &E.

CONCLUSION

For the foregoing reasons, the CAC respectfully requests that the Court affirm the District Court's order.

Dated: New York, New York
June 12, 2012

Respectfully submitted,

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest H. Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Counsel for the Claimants' Advisory Committee

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 10,321 words.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

CERTIFICATE OF SERVICE

I certify that on June 12, 2012, I electronically filed a copy of the foregoing Brief of Appellee Claimants' Advisory Committee 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.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-0005)

RE#	
701-3	Amended Joint Disclosure Statement with respect to Amended Joint Plan of Reorganization of Dow Corning Corporation
714	01/08/2010 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	01/08/2010 Declaration of Paul J. Hinton
714-4	06/01/2004 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)
714-16	06/01/2004 Second Amended and Restated Depository Trust Agreement
730	02/12/2010 Claimants' Advisory Committee Response to Dow Corning Corporation's Motion to Enforce Application of Time Value Credits
731-3	08/29/2001 Letter from George H. Tarpley to Honorable Denise Page Hood, Ex. A (Filed Under Seal)
731-4	09/19/2001 Letter from George H. Tarpley to Kenneth H. Eckstein, Ex. B (Filed Under Seal)
731-5	09/24/2001 Letter from George H. Tarpley to Kenneth H. Eckstein, Ex. C (Filed Under Seal)
736	03/02/2010 Dow Corning's Reply in Support of Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization
836	11/28/2011 Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents