UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

REPLY TO DOW CORNING'S REPONSE REGARDING CAC'S MOTION RE "RECEIPT AND RELEASE" DOCUMENTS [DOCKET NUMBER 332]

The Claimants' Advisory Committee filed a Motion challenging the validity of certain "Receipt and Release" documents that Dow Corning's Legal Department solicited from unrepresented breast implant claimants under circumstances that affirmatively misled implanted women about what they were signing and caused them to reasonably believe that they were releasing only their claim against Dow Corning for the "costs of the corrective surgery." The implanted women believed that they were dealing with Dow Corning's Customer Service Department, and instead – undisclosed to those women until now – they were dealing with highly trained, educated paralegals in Dow Corning's Legal Department. Dow Corning does not dispute these facts and instead cavalierly responds, "what's wrong with that?" Response at p. 16. The CAC submits that Dow Corning's deception invalidates the "Receipt and Release" document on grounds of unconscionability, fraud, deception and mistake of fact and, as U.S. District Judge Carl Rubin forewarned Dow Corning in 1992, the release document "isn't worth the paper it's printed on."

For these reasons, and as detailed in the CAC's Motion and this Reply, the CAC respectfully requests that the Court enter an Order that claimants who signed the "Receipt and Release" document are eligible to seek rupture and disease or expedited release benefits. Should

the Court require additional information, the CAC requests that it be provided an opportunity to depose individuals involved in the establishment and operation of the various explant programs including discovery of the "Implant Issue Management Team" and Dow Corning's Legal Department documents and staff which developed, implemented and supervised the various explant programs as "an arm of litigation so that the defendants and defendants attorneys … can almost have a pipeline into the claims …." See Exhibit 6 at DCC 242120597. At a minimum, the CAC requests that Dow Corning be directed to submit a privilege log of all documents related to the explant programs and Implant Issue Management Team as more fully described herein.[1]

1. Dow Corning Erroneously Claims That The "Receipt and Release" Claimants Should Be Governed By The Release Dispute Procedures And That The Motion Is An Attempt To "rewrite the terms of the Plan"

Dow Corning begins its critique of the CAC's Motion by stating (without supporting proof) that it was amenable to cover all claimants in the Release Dispute Procedures that were submitted to and approved by the Court in December 2004, but that the CAC insisted that certain claimants be carved out. They proceed to claim that the CAC "impermissibly seeks to rewrite the terms of the Plan by creating a procedural mechanism not found within the four corners of, and not contemplated at the time of voting or confirmation of, the Plan." Response at pp. 1-3 and 8. We are, at a minimum, puzzled by this claim, since letters generated by Dow Corning, not the CAC, expressly rejected the inclusion of these claimants in the Release Dispute Procedures. See Exhibit 35 attached hereto, E-mail from Deborah Greenspan to D. Pendleton-Dominguez and E. Hornsby dated 8/6/2004 ("This document

[1] Since Dow Corning submitted a privilege log for review to Judge Pointer in the MDL 926 proceedings, it will not be burdensome for them to identify those documents that pertain to the explant programs it operated from 1992 – 1995.

does not cover the issue you raised about the $15,000 releases. We have discussed this and believe that persons who entered into such releases are barred by the terms of the Plan.).[2]

Further, Dow Corning's suggestion that the dispute should be resolved through the existing stipulated administrative process is disingenuous. As Dow Corning's own account of this procedure makes clear, the Claims Administrator is empowered to set aside the purported release only on certain technical and mechanical grounds, such as a determination that "'the person identified in the release . . . is not the same person as the Claimant.'" Response at p. 2 (quoting the December 23, 2004 *Stipulation and Order*). Dow Corning has consistently taken the position that neither the Claims Administrator nor the Appeals Judge is empowered under this process to consider the types of issues presented in this Motion. Thus, agreeing to fold the claimants covered by the Motion into that process would be tantamount to abandoning their claim that the disputed release form is misleading and unenforceable as a general release.[3]

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[2] The parties thereafter engaged in lengthy discussions about how to address the legal issues presented by the two groups of claimants now identified in paragraph 1 of the Release Dispute Procedures and agreed that they would be governed by "the court-approved protocols for Plan interpretation disputes ...." See Exhibit 36 attached hereto, 9/13/04 e-mail from Dianna Pendleton-Dominguez to Deborah Greenspan. Again, at Dow Corning's insistence, the Release Dispute Procedures were edited to reflect that they did not apply to these groups of claimants. See Exhibit 37A attached hereto, e-mail from Deborah Greenspan to Dianna Pendleton-Dominguez dated 9/17/04 ("I am not sure that we should indicate in the procedures what is going to happen with the 15,000 issues etc. **Why not just say that these procedures do not apply to those issues.**") (emphasis added). The handwritten notations on Exhibit 37A were made by D. Pendleton-Dominguez shortly after the e-mail was received and reflect the agreement reached between the parties during a telephone call. See Exhibit 37, Declaration of D. Pendleton-Dominguez.

[3] Dow Corning suggests that "The relief sought may be pursued either by individual actions or by a negotiated overall resolution ...." Response at p. 8. The CAC is puzzled by – but agrees with -- the suggestion that there should be a "negotiated overall resolution" on this issue because of the similarity of facts surrounding the circumstances of the execution of the "Receipt and Release" document. In fact, the CAC has made numerous proposals and overtures to Dow Corning over the past two years and has been rebuffed each time. The CAC remains willing and

Alternatively, claimants who mistakenly thought they were eligible for the Settlement Option because they reasonably believed the release applied only to explant expenses, should have their claims treated as opt-out claimants free to pursue their claims against the Litigation Facility. If claimants had been informed prior to the opt-out decision in 2004 that Dow Corning objected to their eligibility in the Settlement Option, then they could have elected litigation. The large majority of these claimants, however, were not told that they were ineligible until after the opt-out deadline had passed.[4]

2. **Dow Corning Does Not Dispute That $1,200 Was Inadequate To Pay For Explantation Expenses**

Dow Corning, aware that its $1,200 payment for explant expenses is meager and difficult to defend, instead tries to distract the Court from this by describing the payment as a "helping hand" and that claims of explant expenses of $20,000 are "exaggerated." Response at p. 4. Dow Corning's claims simply do not stand up to scrutiny. Dow Corning is well aware that the explant expenses of $15,000 - $20,000 are not exaggerated, as documented by

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open to discussions on this issue. Moreover, we understand that several such motions have been successfully mediated in connection with opt-out claims. A similar procedure before the same mediator may be an appropriate way to address claims on a case-by-case basis if the Court declines to enter a global ruling.

[4] The CAC finds amusing at best, and objectionable at worst, the unsubstantiated allegation that Dow Corning repeats throughout its Response that the CAC somehow hand-picked six of the best statements it had from claimants and disregarded others. The allegation is false and, once again, ignores the history surrounding the procedures for release claimants. Release dispute claimants in paragraph 1 of the Procedures were instructed to contact the CAC, pursuant to letters reviewed and agreed to by the CAC and Dow Corning. The CAC did not hand-pick them, they contacted the CAC and offered to submit statements documenting their first-hand knowledge of the circumstances surrounding the release of their explant expenses.

hundreds of such invoices in its files.[5] Whether the explant expenses are $2,000 or $20,000, it is undisputed that Dow Corning knew that $1,200 was grossly insufficient to pay for medically necessary surgery for removal of its failed implants. If Dow Corning had such confidence in the $1,200 payment figure, one can only wonder why it chose to create and establish a second claims department within Dow Corning at the same time that the Removal Assistance Program was created in 1992[6] but then failed to include this pertinent fact in its press release and other publicity concerning the Removal Assistance Program. The only logical conclusion that can be drawn is that Dow Corning's Legal Department anticipated, even expected, that women would question the adequacy of the $1,200 figure and, once that occurred, their call was transferred or referred to the second explant payment group.

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[5] For example, attached is a document which releases Dow Corning for surgical costs of $19,070 in 1994. See Exhibit 38 attached hereto, "Settlement Agreement and General Release" dated 3/10/1994. There is no doubt that the entire amount in the release document was solely for the explantation procedure, as evidenced by the March 9, 2004 letter to the claimant stating, "Once I receive the signed release, I will have our check for $19,070 made payable to Dr. Jerome Craft." See Exhibit 39 attached hereto, letter dated 3/9/2004 from Dow Corning to claimant (name redacted). The claimant did not receive any compensation for damages or other injuries; the payment was strictly and solely to pay for the explantation procedure. In addition to this example, Dow Corning was aware of many, many other claimants whose surgical explant expenses were in excess of $15,000, and that the only amount reflected in the "release" document is the amount of the surgeon's fees. See, e.g., Exhibits 40, 41 and 42 attached hereto, examples of surgical expenses paid by Dow Corning on behalf of claimants in the amounts of $17,500; $17,880.27; and $18,909.62 respectively.

[6] See Response at p. 10: "The claims resolution function continued as the controversy grew, and part of its work was done **by a newly formed Customer Relations Department staffed in part by paralegals who, among other things, fielded increasingly numerous calls from claimants** ...." The Customer Relations Department did not develop by chance, but by design. The deliberate renaming of paralegals to Customer Relations, the failure to disclose on the letterhead or in the body of the letter that claimants were dealing with the litigation group and in-house Legal Department, the failure of any correspondence or notes reflecting any discussion whatsoever on other types of damages or expense, all lends itself to the reasonable conclusion reached by claimants that Dow Corning was, like other corporate entities, following its stated "company policy" to reimburse users of its products when the product failed as a public relations gesture rather than engaging in a legal transaction.

Interestingly, Dow Corning claims in its Response that "it did not feel at the time that it could afford to pay all explant surgery costs for all patients ..." Response at p. 12. It then boasts that it paid approximately $6 million in total for this program over 3 years because of its alleged concern for implanted women. Yet, by Dow Corning's own words – words that it did not dispute in its Response, the explant programs and so-called information center were established to be "an arm of litigation" and a "pipeline into the claims" for defendants. See Exhibit 6 to CAC's Motion. Because these explant expense payments were defense costs, Dow Corning sought and received reimbursement from its insurers for every penny expended on explant payments to claimants and doctors. It did not pay for the various explant programs; its insurers did.[7] Moreover, when the sum of $6 million is placed in context with other amounts Dow Corning expended on its defense, it is apparent that they could and did have funds to pay womens' explant expenses in full. For example, in the same press release that Keith McKennon announced the Removal Assistance Program, its lead announcement concerned the establishment of a **$10 million fund** for "research." See Exhibit 3 to CAC's Motion. In a separate litigation with its insurers, Dow Corning's Vice President, Secretary and General Counsel, James R. Jenkins, admitted that the real reason for this and other funding of so-called "independent science" was to fund studies favorable to Dow Corning's position in the litigation. See Exhibit 43 attached hereto, Affidavit of James R. Jenkins.

[7] Explant claims paid by Dow Corning in the Removal Assistance Program and the explant claims process were reimbursed to it from its insurers. See Exhibit 12 to CAC's Motion, DCC 242060925. In the "Weekly Update On Claims" given to the Chairman of the Board and C.E.O. McKennon and Vice President and General Counsel Jenkins, 1,260 total claims are noted and, "Of total claims, those resolved but waiting for reimbursement from Insurance Company – 37." Dow Corning and its insurers could have afforded to pay more than $1,200 for explant expenses.

Documents produced in the multi-district and bankruptcy proceedings evidence that Dow Corning paid a staggering $22.6 million on its defense by funding research favorable to its position from 1992 to May 15, 1995, the date Dow Corning filed for bankruptcy protection. See Exhibit 44 attached hereto (this exhibit is being submitted under seal because the CAC believes it is subject to a confidentiality order entered in the bankruptcy proceedings. We note though that this same information – that in excess of $20 million had been expended on defense studies -- was also testified about during the deposition of former C.E.O. and Chairman of the Board of Dow Corning, Keith McKennon. See Exhibit 45 attached hereto, excerpt of Deposition of Keith McKennon at p. 106-107.) During the bankruptcy case, Dow Corning paid an additional $21 million towards these same studies that it had committed to pay before it sought bankruptcy protection. See Exhibit 44 attached hereto. Thus, Dow Corning paid $43 million in external defense studies, made "donations" of millions more, and expended untold additional millions of dollars on internal defense studies. Id. Significantly, just like the explant expenses paid to claimants were reimbursed to Dow Corning by its insurers, Dow Corning sought reimbursement from its insurers for the payments it made to fund its defense studies as well.[8]

[8] In an affidavit executed by Vice President, Secretary and General Counsel, James Jenkins, in 1996 and submitted in the underlying litigation with Dow Corning's insurers, Jenkins testified that Dow Corning's Legal Department and scientists met with outside counsel in April 1992 and gave presentations on various studies Dow Corning was funding as part of its defense in the litigation. See Exhibit 43 attached, Affidavit of James Jenkins. Jenkins states, "It was explained that these studies were intended to be a centerpiece of Dow Corning's generic efforts." Id. at paragraph 2. Further, "In order to defend against silicone breast implant claims, Dow Corning funded or contributed funding to a number of internal and external studies which were intended to provide the epidemiological data necessary to defend against allegations of breast implant plaintiffs that their breast implants caused certain diseases." Id. at paragraph 3. Telling, he testified that, "**Each external scientific study that Dow Corning funded was only after consulting with legal counsel to determine its impact on the breast implant litigation.**" (emphasis added)

It is clear that Dow Corning could have afforded doubling, tripling, even quadrupling the amount of its meager $1,200 payment (resulting in a total payment of $12, $18 or $24 million) and this would have paid for a substantial number of implanted women's surgeries in full. Significantly, we note that the $1,200 was substantially below the explant payment paid to claimants in the Revised Settlement Program ($3,000) and that paid to Dow Corning women in the Settlement Option ($5,000). Dow Corning's claims that the $1,200 payment was set because it was all Dow Corning could afford simply doesn't ring true when placed in the proper context. Rather, the uncontroverted evidence is that Dow Corning knowingly selected and advertised a low payment amount for the Removal Assistance Program while simultaneously creating a second explant claims group (that was not publicized) that was staffed by its paralegals/Customer Relations Specialists. The Customer Relation Specialists dangled a large carrot to financially desperate women that Dow Corning would, pursuant to its "company policy" "assume financial responsibility for" their "reasonable, uninsured, out-of-pocket expenses associated with their corrective surgery."[9]

To the extent there are any questions about the various explant programs operated by the Legal Department, then the CAC is prepared to conduct depositions and seek discovery of the Legal Department and its files, and specifically the Customer Relations Department and the Implant Issue Management Team.

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[9] Moreover, Dow Corning had to have known it was dealing with women whose first language is not English (e.g., Vy Wappel, Neldy Diaz), who were indigent and subsisted on total disability (see Exhibit 46 attached), who had pressing health concerns (Exhibit 2D to CAC's Motion), and most importantly, were not individually represented by counsel or even advised by Dow Corning that they should consult with counsel about their rights.

3. Contrary to Dow Corning's Assertions, The Amounts Reflected In The "Receipt and Release" Documents Were Not Negotiated And Were Not Discretionary Funds To Be Used Any Way A Claimant Wanted

Once again, Dow Corning makes rash, unsupported statements about claimants when the facts in their own documents belie their claims. Dow Corning claims that it "gave women two openly disclosed options" of either the meager $1,200 payment which it knew would not cover the costs of the surgery, or "higher, negotiated amounts, which claimants had the choice to apply toward their explant surgery or to use in whatever other way they wished, in exchange for a release." Response at p. 6. The testimony of Dow Corning's C.E.O. and Chairman of the Board though demonstrates that it knew that the women they were targeting for their explant programs had "no choice" but to accept the non-negotiable terms Dow Corning offered. In his 1994 deposition, McKennon testified that:

> I had a specific concern which prompted this comment and this first page about that group of women who for a legitimate medical reason might need to have an implant removed or implants removed and simply didn't have the financial resources or the insurance resources to do so because it seemed to me **that was the one group of women in this whole controversy who were left without a choice about what they did.** I didn't feel good about that, frankly ....

See Exhibit 45 attached at p. 101-102, excerpt of Deposition of Keith McKennon, 8/30/1994. (emphasis added).[10] For example, one claimant's spouse notes his wife's desperation, stating:

> I then called Dow Corning and explained my situation to them and also let them know that we were ingenent [sic – indigent], at the time and I had not worked for 15 years, due to my being 100% permanently and totally disabled service [sic] connected from the Korean War. That was and still is my only income along with Social Security living month to month.

[10] McKennon repeated his comments that in 1992, women with Dow Corning breast implants in their bodies who needed explantation "might not be in the position to choose ...." See Exhibit 45 at p. 182-183.

See Exhibit 46 attached hereto (claimant name redacted). Like McKennon noted in his deposition, claimants such as Ms. [name redacted] "were left without a choice" in seeking more than the meager $1,200 offered by Dow Corning.[11]

The circumstances in which Dow Corning communicated with women led them to reasonably believe that the only claim under consideration was for explant expenses. For example, in the brochure attached as Exhibit 1E to the Snow-Swantek Affidavit, Dow Corning's claims process does not offer to compensate women for damages for scarring, disfigurement, pain and suffering, loss of income, rupture or disease. In fact, there is no mention of any of these injuries as covered by the claims process. Rather, Dow Corning states that the claims process has a very narrow focus: Dow Corning "will assume financial responsibility for the reasonable, out-of-pocket expenses associated with the corrective surgery." See Exhibit 1 E to the Response. The expense payment was conditioned on Dow Corning's examination of the removed implant to confirm that the failure "appears to be related to our materials or our workmanship." Id.

Given the title of the Dow Corning employee claimants dealt with – Customer Relations Specialist, not paralegal– and the use of carefully scripted language by the Legal Department in letters and other communications that stated it was Dow Corning's "company policy" to "assume financial responsibility" for explant expenses for its failed products, it is a stretch – indeed, it is not credible -- for Dow Corning to now assert that women were free to "negotiate" or to use the explant payment for anything other than explant expenses. The undisputed fact remains that

[11] This same claimant wrote to the Court in 2005 expressing her "shock" at learning in 2005 that Dow Corning is now claiming that the release of explant expenses is a release of all of their rights to compensation. See Exhibit 46.

the entire explant expense payment was paid directly to the explanting surgeon or to the claimant who in turn paid the entire amount to the doctor.[12]

Similarly, in the standard form letter that Dow Corning sent to claimants, there is no reference that Dow Corning and the claimant discussed or contemplated anything except for the reimbursement of explant expenses. The form letter, which was also approved by the Dow Corning Legal Department, states that it was "**our company policy to consider any reasonable, uninsured, out-of-pocket expenses for failure of our product that prove to be related to its workmanship or materials.**" See Exhibit 46 attached hereto (claimant name redacted).[13] Claimants were led to believe that Dow Corning had a "company policy" that reimbursed users of its products when the product failed. And it wasn't just any expenses that Dow Corning was willing to pay. It was only those that were "reasonable, uninsured, [and] out-of-pocket" and that were "associated with the expenses of the corrective surgery." The letter does not mention or suggest that general damages for pain and suffering, rupture, disease or other injuries are available through the claims process. To the contrary, all communications focused solely on Dow Corning's acknowledged assumption of financial responsibility for the claimant's explant

[12] The brochure goes on to state that the only other expense Dow Corning would consider was an expense associated with the corrective surgery, such as the costs of prescription pain medicine paid to claimant Boyette ($163). See Exhibit 2A to the CAC's Motion, Statement of Bonnie Boyette.

[13] Dow Corning suggests that its letters to explanting surgeons describing the two options – one where the surgeon would be paid in full and one where he/she would not – are similar to the letter that the SF-DCT Claims Administrator (not the CAC) wrote to doctors in 2006 asking them to cooperate with claimants in providing treatment and information for their claim. The Dow Corning letter references conversations with the doctors about their patients, and then asks the doctor to provide the patient with legal forms and to solicit their agreement to and signature on those forms. In sharp contrast, the SF-DCT letter does not ask the doctor to provide information to patients about their legal rights and claim options; it merely asks them to cooperate. The two types of letters are in no way similar.

expenses. This is hardly the free-wheeling negotiation for higher amounts that claimants could spend at their discretion as Dow Corning now wants this court to believe.

Similarly, Dow Corning used doctors as its agents to secure releases for the surgery in exchange for payment of all the doctor's expenses (with no money paid to the patient). See, e.g., Exhibit 47 attached hereto, Dow Corning letter to Dr. Lars Enevoldsen dated 7/10/1992 (claimant name redacted). In Exhibit 47, Dow Corning's Customer Relations Specialist writes to an explanting doctor, Dr. Enevoldsen, stating, "This letter is to confirm our conversation on June 17, 1992." Internal call notes made by the Customer Relations Specialist reflect that she and Dr. Enevoldsen discussed that the patient was uninsured, one implant was ruptured and the other was "bleeding badly," and that Dr. Enevoldsen wanted to know what Dow Corning would do for the patient. See Exhibit 49 attached hereto, Dow Corning notes of calls with Dr. Enevoldsen (claimant name redacted). The Customer Relations Specialist wrote in her notes, "Told him std claims process would probably best serve pt." Id. Thus, the Customer Relations Specialist advised the doctor what she thought was in the patient's best interests without ever having spoken with the patient and without the benefit of informed disclosure to the patient that she could have participated in the $1,200 program.

Dow Corning proceeds to tell the doctor that, "As we discussed, **it is our company policy to assume financial responsibility for any reasonable, uninsured, out-of-pocket expenses related to the failure of our product due to its workmanship or materials**...." See Exhibit 47. The Customer Relations Specialist (paralegal) then instructs Dr. Enevoldsen, "If you have any questions concerning the above process, please feel free to call me at my toll-free number .... Thank you for your patience!" Id. (emphasis added) Nowhere in the letter is there any mention or offer of compensation for the claimant's rupture; the letter references

reimbursement for certain expenses only. Additionally, the Customer Relations Specialist does not suggest what the patient should do or who she should call if she had any questions, nor does she even recommend that the doctor ask his patient to contact Dow Corning to discuss the details of her alleged release of all claims.

Thereafter, Dow Corning sent Dr. Enevoldsen, not the claimant, a copy of the release for the costs of the surgery (all of which were paid to Dr. Enevoldsen), and asked Dr. Enevoldsen to "have her [the patient] sign the release in the presence of a witness and return it to me the envelope provided." See Exhibit 50 attached hereto, Dow Corning Wright letter to Dr. Lars Enevoldsen dated 10/5/1992. The Customer Relations Specialist advises the doctor, "Should you have any questions, please do not hesitate to call me .... Thank you for your cooperation." Id. (emphasis added) Again, Dow Corning does not suggest that the patient contact anyone. All contact by Dow Corning concerning this release was solely and exclusively with the doctor, not the claimant, and in fact, the Customer Relations Specialist thanks the doctor for his cooperation. It was Dow Corning who told the doctor that the claimant should use the claims process instead of the Removal Assistance Program stating, in her own words, that this "would probably best serve pt."

It is hardly surprising – indeed, it was reasonable -- that claimants who had not filed a lawsuit or initiated legal proceedings against Dow Corning and who were thus unrepresented -- were under the impression that they were dealing with a customer service group, not the Legal Department of the company that made their implants, and that they were releasing only their claim for explant expenses in much the same way that companies reimburse users of its products when they fail. In fact, Dow Corning's standard form letter includes the following, "We appreciate being given the opportunity to stand behind our products." See Exhibit 54 attached

hereto, Dow Corning Wright letter to Dr. Enevoldsen dated 11/2/1992 and stamped with the logo "Nov 09 1992 LEGAL DEPARTMENT." To suddenly be told 10-14 years later that Dow Corning was asserting the release as a bar to all of their claims came as a shock to these claimants. As the claimant in the above discussion wrote in 2005 when she was informed that the release was being interpreted to bar her from all compensation:

> My Dow Chemical implants were removed in 1992. RUPTURE. Without understanding what I was told to sign, I signed the document releasing Dow Chemical from all claims. Surgery would not be scheduled until all forms were completed, as part of the Removal Assistance Program. I was in fear of my life and wanted surgery as soon as possible. I signed. I was not aware, and it was not made clear to me that by doing so, it would bar me from participating in this, or any claim. I did not receive 'one red cent. The $7,500 went directly to the doctor....
>
> Wow! What a shock. All these years and years of waiting. Now I am told I will not be included. Shame on you! How can this happen? No. I will not allow myself to be treated in this manner. I object. I will continue to object.
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> My name is Gracie. I am a person. A person deserving of compensation for all the years of pain, worry and suffering. I have been devastated by the notification of ineligibility to participate in the settlement. I am appalled Dow Chemical can turn away from me. I am still suffering. I am still in pain. I am scared. PLEASE! PLEASE! Help me. I am crushed by this. I feel I deserve to be compensated. The mental and physical pain are at times unbearable.

See Exhibit 48 attached hereto (claimant name redacted).

If there had been true negotiation, as Dow Corning now claims, then surely there would have been discussion and reference to compensation in the notes and letters that Dow Corning has produced, not just mention of reimbursement of explant expenses. One would expect to see references to scarring, disfigurement, pain and suffering, disease, etc. and offers and counter-offers for compensation.[14] There are none. One would also expect to see medical authorization

[14] Dow Corning's letter to the claimant in Exhibit 46 above references a call the Dow Corning paralegal had with the claimant's spouse. The paralegal was apparently told that the claimant was experiencing "complications" but the paralegal offered only her "regret," not compensation for the claimant's complications. She states, "As I discussed with your husband, it is our

requests from Dow Corning to the claimant's primary treating doctor for disease or other injuries. There are none. The only records Dow Corning obtained concerned the explant expenses and operative record to confirm the surgery occurred. One would also expect to see settlement checks that do not equal the exact amount of the explant expenses. Instead, the two amounts are the same. These were not negotiated settlements of compensation for general damages as Dow Corning now tries to portray it. These were checks for reimbursement of expenses pursuant to Dow Corning's stated "company policy" to pay for its failed products.

4. Dow Corning Does Not Dispute That Its Legal Department Created and Supervised Both Various Explant Programs As Part of Its Defense of Implant Litigation

Dow Corning makes much ado that its Implant Information Center and Customer Relations Specialists departments were supposedly separate and distinct units within Dow Corning. Tellingly, their own documents and exhibits prove otherwise. First, we note that nowhere in the Response does Dow Corning dispute that all of its various explant payment programs operated under the supervision of the Dow Corning Legal Department. The 1994 organizational chart attached as Exhibit 4B to the Affidavit of Peggy Gerstacker establishes that in 1994 (not 1992 when the various explant programs were established), there was one manager for all explant payment programs: Peggy Gerstacker. While Gerstacker – who until June 1992 was the former controller for Dow Corning's Midland plant -- claims that she personally did not report to the Legal Department, she does not state in her affidavit who she did report to. It is clear from the documents attached to Gerstacker's affidavit that she reported directly to the "Implant Issue Management Team" that was formed in 1991 to specifically address implant

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company policy to consider any reasonable, uninsured, out-of-pocket expenses for failure of our product that prove to be related to its workmanship or materials. Reimbursement decisions are based upon evaluation of the removed, sterilized implant." See Exhibit 46 attached.

litigation issues.[15] The Management Team consisted of employees at the highest levels within the company – Keith McKennon, the CEO (who transferred from Dow Chemical to Dow Corning in early 1992; John Rigas in the Legal Department and Jim Jenkins, the Vice President and General Counsel; Ralph Cook, the Director of Epidemiology (who also transferred from Dow Chemical to Dow Corning in 1992); and Barie Carmichael, Vice President and Director of Communications, among others.

It appears that there were no real lines of demarcation between the various departments under the umbrella of the Implant Issue Management Team. For example, in Exhibit 12 to the CAC's Motion, Lynn Diebold, a Customer Relations Specialist, sends a "Weekly Update On Claims" memo to Greg Thiess, an attorney in-house at Dow Corning, with copies to the C.E.O.

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[15] The CAC notes that it was not aware of the existence of the Implant Issue Management Team until recently. We have reviewed the MDL 926 discovery materials and found only limited references to it: There is a two-page "Preface" dated 9/11/1991 prepared by Art Rathjen, Director of the Dow Corning Service to Medical Research for the Implant Issue Management Team. Rathjen prepared a two volume chronology of various implant package inserts, advertising, and implant modifications for the Management Team. See Exhibit 51 attached hereto, DCC 242010177 – 242010180. Copies of the two volume chronology were not produced in the MDL 926. The CAC believes that Dow Corning asserted that the documents were privileged. In addition, there is a 11/1/1991 memo from Faye Gorman to the Implant Issue Management Team that summarizes Dow Corning's lobbying activities with Congress to support keeping breast implants on the market. See Exhibit 52 attached hereto, KKA 33898 – 33901. What is significant is that this memo was originally Bates stamped QDC 115860 – 115863 indicating that it was initially classified as privileged but was later removed from the privilege log.

Further, the CAC has reviewed the deposition testimony of Keith McKennon where he referred to regular monthly management meetings, but there was no reference to a specific committee called the Implant Issue Management Team that was charged with all legal defense of Dow Corning's breast implant litigation. McKennon testified that lawyers for Dow Corning routinely would review his records and remove documents for review for production. Files containing Implant Issue Management Team meetings have not been uncovered through our search of documents in the National Depository. If such documents exist, the CAC requests that Dow Corning identify the location of these documents by box and Bates numbers. If Dow Corning is asserting a privilege over any documents from any Implant Issue Management Team member, then the CAC requests that the privilege log be produced for inspection by the CAC with a detailed basis for the privilege assertion.

and Chairman of the Board (Keith McKennon) and General Counsel (Jim Jenkins) of Dow Corning. Interestingly, Gerstacker, to whom Dow Corning alleges the Customer Relations Department reported in its 1994 organizational chart (Exhibit 4A), is not included as a recipient of the weekly update claims memo despite the fact that she is supposedly supervising this department. In addition, in Exhibit 25 to the CAC's Motion entitled "Resource People" within Dow Corning, Customer Relations personnel are listed under the heading "Legal," not Implant Issue Operations as seen on the 1994 organizational chart. This supports the CAC's position that all of the explant groups listed under Implant Issue Operations were in fact part of Dow Corning's legal defense team, and callers to the Information Center, Removal Assistance Program and those referred to the claims group were never told the true nature of the persons they were dealing with when they called.

Similarly, Dow Corning claims that Snow-Swantek supervised the Implant Information Center and Removal Assistance Program in 1992. Gerstacker separately states in her Affidavit that Paulette Williams was the Supervisor of the Implant Information Center in 1992. Under the 1994 organizational chart attached as Exhibit A to Gerstacker's Affidavit (Exhibit 4 to Dow Corning's Response), Williams would report to Snow-Swantek as her superior. Yet, in a 4/3/1992 memo, Snow-Swantek writes to her subordinate, Williams, with copies to Lynn Diebold (Customer Relations Specialist) and Mark Grouix (a member of the Implant Issue Management Team) regarding the Removal Assistance Program. See Exhibit 28 to CAC's Motion. Snow-Swantek states that she was directed to write to Williams "[p]er Keith's instruction," – referring to C.E.O. Keith McKennon – to update her on the feedback of what callers are saying about the Removal Assistance Program. Id. Again, Gerstacker is not copied on the memo, but members of the Customer Relations and Implant Issue Management Team are,

indicating once again that the alleged lines and distinctions between various explant groups were illusory. In practice, all explant groups were governed by and interconnected through the Implant Issue Management Team (whose members included Vice President and General Counsel of Dow Corning and other in-house attorneys) and the Legal Department.[16]

Dow Corning's Response should be measured by what documents Dow Corning selectively produced, and, more importantly, by what documents it did not produce and which claims it did not refute. Where are the other memos and updates for the various explant payment programs similar to the Snow-Swantek 4/3/1992 memo and the Diebold memo of 12/30/1992? Where are the memos creating and establishing the Implant Issues Management Team, the agenda of this team's meetings, and the inter-office correspondence between its members? Why is it that the only organizational chart produced is from 1994, two years after the events in question? The CAC believes that relevant non-privileged documents concerning the Implant Issue Management Team are being shielded from discovery under the guise of legal privilege. Dow Corning deliberately established a scheme to run its Customer Relations and other explant groups through its Legal Department yet when claimants challenge the validity of the releases and the circumstances in which they were obtained, it appears that many relevant documents have not been produced. The CAC requests that the Court order Dow Corning to provide a privilege log with regard to all activities of the Implant Issue Management Team, the Customer

[16] As noted in the job descriptions of Customer Relations Specialists, Supervisors and Managers, they reported to and worked for the Legal Department. See Exhibits 17, 26 and 27 to the CAC's Motion. The Complaint Investigation/ Medical Device Reporting group also reported and was part of the Legal Department. The fact that all of these groups are listed under the umbrella of the Implant Issue Operations confirms, not refutes, the fact that all explant programs were part of a deliberately crafted defense plan. As Williams' stated during the training session for Implant Information Center staffers, the call center was merely an "arm of litigation so that the defendants and defendants attorneys … can almost have a pipeline into the claims …." See Exhibit 6 to the CAC's Motion.

Relations Department, to identify the location, by Bates numbers, of all non-privileged documents concerning the various explant programs in the National Depository, and to permit discovery of key persons who worked on these issues in 1992.

5. **The Circumstances Surrounding The Execution of the "Receipt and Release" Document Demonstrate That The Release Was Limited To The Costs of the Corrective Surgery, Not a Release of All Claims**

Rather than allowing the Court to be drawn into an endless debate over whether calls were transferred between its various explant programs or were "referred to them" or whether Dow Corning intended to disenfranchise the most financially desperate women or simply be a "helping hand" as they claim, we believe that the proper focus should be on the circumstances surrounding the claimant's reasonable belief and understanding when the "Receipt and Release" document was executed. As noted above and at length in the CAC's Motion, there clearly was not a "meeting of the minds" between claimants and Dow Corning with regard to the intended scope of the release. Based on the carefully drafted language in its letters – all of which were approved by the Legal Department – and on the language in the "Receipt and Release" document itself, the impression created in claimants' mind at the time was that they were discussing and releasing only their claim for the "reasonable, uninsured, out-of-pocket expenses associated with the corrective surgery." Their reliance on Dow Corning's language was reasonable and understandable, particularly given Dow Corning's statements that reimbursement of expenses was "company policy."

Dow Corning was the drafter of the language, and any ambiguity about the scope of the release should be construed against Dow Corning and in favor of the claimants. In this light, it is clear that the document should not be interpreted to bar claims for rupture and disease.

a) Claimant Bonnie Boyette

Dow Corning suggests that unrepresented claimant, Bonnie Boyette, should not be surprised by the revelation that Dow Corning spoke privately with her treating doctor about her medical status without her knowledge or consent. To support their claim, they point to a standard form "Authorization to Release Medical Information" which merely authorized Ms. Boyette's doctors to provide Dow Corning with copies of medical records. Nothing in the Authorization Form suggested that Dow Corning would breach a patient's confidentiality and privacy rights about her medical treatment by telephoning her treating doctor to discuss her condition with Dow Corning. Given that Dow Corning's "company policy" was to "assume financial responsibility" for its product when it failed and that the only thing requested by Dow Corning was documentation of the "reasonable, uninsured, out-of-pocket expenses associated with the corrective surgery," it is indeed "shocking" as Ms. Boyette described in her statement that Dow Corning breached her privacy in such a way.[17] The only expectation that Ms. Boyette (and other claimants in her situation) would have is that Dow Corning would confirm that the surgery occurred and what the "reasonable, uninsured, out-of-pocket expenses" were. Moreover, nothing in the handwritten notes of an unidentified person at Dow Corning suggests that Ms. Boyette should have been aware that Dow Corning was discussing her medical status with her

[17] Dow Corning is just plain wrong in its claim that by signing the authorization to release her medical records Ms. Boyette "authorized her doctor to discuss her medical situation with Dow Corning Wright prior to her removal surgery." Response at p. 22. Dow Corning cites to the Authorization Form to support its claim, but nothing in that document mentions discussions or conversations that might occur between Dow Corning and her treating doctor. The form says, "I hereby request and authorize you to disclose, whenever required to do so by Dow Corning Wright Corporation or its representative, any and all information you may have concerning Bonnie Boyette with respect to the mammary implant surgery including medical history, consultation, prescription or treatment, including X-ray plates and copies of all hospital records. A photostatic copy of this authorization shall be considered as effective and valid as the original." See Exhibit 5G to Dow Corning's Response.

doctor. The notes reflect that the unidentified note-taker informed Ms. Boyette that, "I would have hosp. & dr. send me her bills & then call her w/amt & have a release sent out to her. Once she signed the release we would issue the check. She said this was fine." Thus, the entire conversation concerned obtaining information about Ms. Boyette's expenses, nothing more. There was no conversation about other damages or claims for rupture, scarring and disfigurement. It was solely and exclusively about reimbursing Ms. Boyette's doctor for the "costs of the corrective surgery" consistent with Dow Corning's stated "company policy."

More importantly, nothing in any of the documents produced by Dow Corning (Exhibits G, H, I and J) suggests that it informed Ms. Boyette that she had other options that would not have required her to release her rights to explant compensation. The only correspondence (and explanation of the various options) was between Dow Corning and the explanting doctor, Dr. Dean, not with Ms. Boyette. See Exhibit 53 attached hereto, letter from Dow Corning to Dr. John Dean dated 9/4/1992.

b) Claimants Neldy Diaz and Vy Wappel

Similarly, with Neldy Diaz and Vy Wappel, both claimants for whom English is not their first language, nothing in their statements attached to the CAC's Motion is inconsistent or contradictory to the documents attached to the Response. The undisputed fact is that when Ms. Diaz contacted the widely publicized toll-free number for Dow Corning to obtain assistance for her explant surgery, she was told by them that she would have to sign a release of her rights for explantation if she wanted Dow Corning to "assume financial responsibility for [her] reasonable, out-of-pocket expenses." The letter from Lynn Diebold to Ms. Diaz attached as Exhibit 5K to Dow Corning's Response says nothing to the contrary. The reference to signing a release refers back only to the explant claim and Ms. Diaz's expenses. Likewise, Ms. Wappel relied on the

language in the letter attached as Exhibit 5L to Dow Corning's Response that states, "Our company policy with regard to claims states that if failure appears to be related to our materials or our workmanship, we will assume financial responsibility for the reasonable, uninsured, out-of-pocket expenses associated with your corrective surgery."

As Judge Rubin stated during the 1992 hearing on the release issue, Dow Corning could solicit releases as long as it did so openly, with full disclosure. The explant programs that Dow Corning's Legal Department established were not operated openly and with full disclosure. Despite the fact that Dow Corning knew the release issue was important to class counsel in 1992 when the TRO was sought, Dow Corning told the Court it would not seek a release and then privately did so anyway. It never disclosed to class counsel or to the Plaintiffs' Steering Committee in the MDL 926 proceedings what it was doing, even when this issue came up in the monthly hearings before Judge Pointer in 1992 and 1993. Similarly, when claimants called seeking the "assistance" that Dow Corning offered, Dow Corning failed to give them all the information it should have concerning who they were talking to, what Dow Corning intended the scope of the release to be, and what the consequences of signing the release would be so that claimants could make an informed decision about their rights. At a minimum, Dow Corning's paralegals should have referred claimants to class counsel for further information about their legal rights. They did not. They could have informed claimants that it was not "assistance" or "reimbursement" it was offering, but a settlement offer in exchange for a general release of all claims for damages. Yet this language does not appear in any correspondence with claimants.

Dow Corning was forewarned by U.S. District Court Judge Carl Rubin in 1992 about the consequences of its failure to give full disclosure to claimants and what would happen if it misled claimants in any way: "If, in fact what occurs is that these people have been misled, that

release isn't worth the paper it's printed on ...." See Exhibit 4 to CAC's Motion, Transcript of TRO Hearing in the *Dante* class proceedings, statements of U.S. District Judge Carl Rubin at 15. The CAC respectfully submits that Judge Rubin was right, and that the "Receipt and Release" document isn't worth the paper it's printed on. It should be interpreted so that justice is done and the only claim that is released is the one claimants thought they were releasing, for explant expenses. As described by Dow Corning in its correspondence to claimants, the "Receipt and Release" should be limited to "the reasonable, uninsured, out-of-pocket expenses associated with the corrective surgery."

6. Enforcement of the "Receipt and Release" Document Would Be Unconscionable

These facts, not meaningfully disputed, establish that it would be unconscionable to enforce this particular release form as a "general release" barring further participation in the Settlement Facility. Dow Corning does not dispute the unconscionability standard set forth at pages 27-28 of the CAC Motion.. *See, e.g., Entergy Mississippi v. Burdette Ginco*, 726 So. 2d 1202, 1207 (Miss. 1998) (unconscionability shown by disparity in sophistication of parties, lack of opportunity to study contract, and great imbalance in parties' relative bargaining power); *Bloss v. Va'ad Harabonim of Riverdale*, 203 A.D.2d 36, 40, 610 N.Y.S.2d 197, 199 (1st Dept. 1994) ("[It is] inequitable to allow a release to bar a claim where . . . it is alleged that the releasor had little time for investigation or deliberation and that it was the result of overreaching or unfair circumstances."). Nor does Dow Corning dispute the elements of "procedural" and "substantive" unconscionability generally applied in the caselaw governing releases. *See Wade v. Austin*, 524 S.W.2d 79, 85 (Tex. Ct. of Civil Appeals) (1975) (finding unconscionability generally based on "procedural abuse" concerning circumstances of contract formation and "substantive abuse" concerning substance of contract terms).

Dow Corning does suggest that the instant facts do not satisfy the unconscionability standard, but the facts described above clearly belie that assertion: these releases were obtained from desperate, often seriously ill women on the eve of surgery in circumstances strongly suggesting that the release related only *to* that surgery, and whether these women got the explant surgery they so desperately needed depended on whether the funds were paid to the doctor. Moreover, claimants are now purported to have released claims that may be worth hundreds of thousands of dollars in return for a tiny fraction of that amount paid directly to their surgeons. Enforcing the release in those circumstances is the essence of unconscionability.

Dow Corning's main argument is that unconscionability must be litigated on a case-by-case basis. *See* Dow Response at 33. The CAC believes that the overarching factual circumstances and the consistent release language involved in each of these cases warrants a global ruling, but at minimum, each claimant must be informed of the opportunity to bring a motion before this Court to establish the particular circumstances rendering it unconscionable in her particular case to enforce the release.

7. Dow Corning Distorts the Record of its Attempts To Take Advantage of Desperate Claimants

While the foregoing facts arguably suffice to establish fraud, the Court need not reach that issue to find that Dow Corning's conduct is a further ground rendering the release form unenforceable as a general release. As the Sixth Circuit has recognized, "misrepresentation in the procurement of a contract renders the agreement avoidable by one induced thereby, irrespective of the culpability of the person making the representation." *Ott v. Midland-Ross Corp.*, 600 F. 2d 24, 32 (6th Cir. 1979). *See also Kraft Foods Inc. v. All These Brand Names, Inc.*, 213 F. Supp. 2d 326, 330 (S.D.N.Y. 2002) (under New York law, contract rescinded for

unilateral mistake where party enters into contract under mistake of material fact where other party knew or should have known such mistake was being made, even absent fraud).

Thus, whether or not Dow Corning specifically intended to *defraud* claimants, it knowingly operated in an environment in which unrepresented claimants were desperate and easily confused; had affirmatively been told that Dow Corning would provide funds for surgery without requiring a release; and were presented with documents in circumstances strongly suggesting that the release was limited to surgery-related issues (e.g., by the claimant's own doctor on the eve of surgery). And, of course, Dow Corning is responsible for the actual language of the release form, which itself misled claimants into believing they were releasing only those claims related to the surgery itself.

Finally, to the extent a claimant turned out to have grievous injuries entitling her to potential damages, or a settlement, dramatically larger than the small amount paid to her surgeon in connection with her surgery, the release may be unenforceable under the doctrine of *mutual* mistake. *See* Opening Memorandum at 29. If the release form is not globally invalidated, this additional ground for setting aside the release also must be preserved for individual claimants with the most serious injuries to demonstrate as an alternative basis for setting aside the purported release.

8. Dow Corning's Procedural Defenses Are Unavailing

Dow Corning interposes a series of procedural objections in an attempt to forestall this Court from remedying the unfairness of enforcing the unconscionable release at issue here. Citing non-bankruptcy cases, Dow Corning argues that this Court is powerless to declare the disputed release misleading and unconscionable in the absence of a formal adversary proceeding. *See* Dow Response at 25. But this Court is amply empowered, under Bankruptcy Code §§ 105

and 1142, to enter orders interpreting and implementing the Plan. "[S]everal courts have held that 11 U.S.C. §§ 1142 provides bankruptcy courts with broad power to enforce the terms of a confirmed plan." *In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 289 (6th Cir. 2001). *See also, e.g., In re Coral Air Inc.*, 40 B.R. 979, 982 (D.V.I. 1984) ("[T]he Court retains wide jurisdiction on a continuing basis to oversee those responsible for implementation of the Plan, and to enter appropriate orders to enforce the intent and specific provisions of the Plan."); *In re Goldblatt Bros., Inc.*, 139 B.R. 736, 741 (Bankr. N.D. Ill. 1991) (same). Moreover, the Court may enter appropriate orders to interpret and implement the Plan in these circumstances without the formality of an adversary proceeding. *See, e.g., Harlow Props., Inc. v. Palouse Producers, Inc.*, 56 B.R. 794, 797-98 (B.A.P. 9th Cir. 1985) (§ 1142 contemplates party affected by Plan seeking relief by motion); *In re Terracor*, 86 B.R. 671, 675 (D. Utah 1988) (whether proceeding to enforce Plan under § 1142(b) should be brought as adversary proceeding or contested matter determined on case-by-case basis as dictated by fairness); *In re Eagle-Picher Indus., Inc.*, 270 B.R. 842, 842 (Bankr. S.D. Ohio 2001) (entertaining motion for declaratory judgment enforcing confirmed Plan); *cf. In re Johns-Manville Corp.*, 97 B.R. 174, 181 (Bankr. S.D.N.Y. 1989) ("[T]o compel adherence to the Plan and prevent violations of the Plan, the Debtors need not demonstrate the strict standard for a preliminary injunction under Fed. R. Civ. P. 65.").

Here, Dow Corning cannot demonstrate that requiring this matter to be heard as a formal adversary proceeding is necessary to protect its rights. The Motion put Dow Corning on notice of the claims and arguments asserted with respect to the disputed release, and it has had a full opportunity to respond on the merits of the issue. Nor is there any question as to whether the CAC is the appropriate party to bring the instant motion. As Dow Corning concedes, Section 4.09(c)(v) of the Settlement Facility and Fund Distribution Agreement ("SFA") expressly

authorizes the CAC to "file a motion or take any other appropriate actions to enforce or be heard in respect of the obligations in Plan and in the Plan Documents."

Dow Corning argues that this provision is inapplicable because the instant dispute is "outside any plan provisions." Dow Response at 27 n.17. However, the Motion squarely presents the question of the meaning of Section 5.01(a) of Annex A to the SFA, which provides the claimants who released their "Claim" against Dow Corning or its Shareholders are ineligible to participate in the Settlement Facility. The CAC submits that this provision must contemplate that only a freely given, valid, and enforceable release will bar a claimant from participating in the Settlement Facility. To implement and enforce the Plan, the Court must determine what type of release would be considered valid and binding, and this Motion provides a vehicle for the Court to do so in an efficient manner with respect to a discrete category of claimants induced to sign the same basic release form. The CAC in turn is the party best situated to argue globally on behalf of these claimants, playing its typical and contemplated role as advocate on matters of general applicability to large numbers of claimants. The CAC has played this role in connection with a series of other pending disputes with respect to Plan interpretation and settlement criteria, without Dow Corning objecting, even though those disputes, too, may have an impact on individual claimants.

As noted above, there is no danger that resolution of this motion will unfairly bind claimants not before the Court. If, as the CAC urges, the Court finds that the disputed release form was facially misleading and cannot be enforced as a general release, in the context of the overall circumstances in 1992-1995, affected claimants will benefit by being permitted to participate in the Settlement Facility, with amounts previously paid to them or on their behalf simply credited as offsets against further settlement amounts. If, however, the Court concludes

that the disputed form is not *facially* misleading, each claimant will be bound only to the extent of that ruling, but still must have the opportunity to bring an individual motion setting forth the particular circumstances arguably rendering the release unconscionable as to her individually. Whether tackled on a global or individual basis, this inquiry is not, as Dow Corning suggests, precluded by the Plan Documents because the provision barring participation by those who release their claims leaves open the question of how the validity of any such release is to be determined. The Court retains the power to determine this question and to establish any necessary procedures to provide due process to such claimants.

CONCLUSION

For the foregoing reasons and those set forth in the Motion, the CAC respectfully requests that the Motion be granted and that the Court rule that the claimants who signed the disputed "Receipt and Release" document are not barred from participating in the Settlement Option.

Respectfully submitted,

ON BEHALF OF THE CLAIMANTS' ADVISORY COMMITTEE

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2006, I electronically filed the foregoing Reply with the Clerk of Court using the ECF system which will send notification of such filing to the following: Debtor's Representatives.

/s/ Dianna Pendleton-Dominguez