UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

REPLY OF CLAIMANTS' ADVISORY COMMITTEE TO THE RESPONSE AND OBJECTION OF DOW CORNING TO THE NOTICE OF FILING OF SUPPLEMENTAL EXHIBIT TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION

On June 9, 2006, the Claims Administrator, David Austern, issued a "Memorandum" to the parties regarding an investigation that he was jointly asked to perform regarding the practices of the MDL 926 Claims Office with regard to the Disability A "vocation or self-care" language. The CAC submitted the "Memorandum" to the Court on June 19, 2006 so that the Court could have the benefit of Mr. Austern's investigation. One day later, Dow Corning filed an Objection and Response (Docket Numbers 409 and 410 respectively) to the Memorandum, urging the Court to disregard it and the work that had been done in investigating the issue as requested by the parties. In essence, Dow Corning's Objection and Response boils down to this: they want this Court to believe that the MDL 926 Claims Office approved Disability Level A claims using the standard of "vocation and self-care" when all evidence is to the contrary. Dow Corning has not produced a single shred of evidence to support their position. The CAC respectfully requests that the Court deny Dow Corning's Objection and Response and consider the Memorandum as relevant and cumulative of other documents which contain the same facts

and conclusions.[1]

1. The Claims Administrator's Memorandum Was Submitted As Soon As It Was Authorized For Public Release

Dow Corning claims that the CAC acted improperly by filing the Memorandum "on the eve of the oral argument" and urges the Court to strike it as untimely based on Local Rule 7.1(d)(2). See Response by Dow Corning at p. 1 (Docket Number 408) and Objection of Dow Corning at p. 1-2 (Docket Number 409). What Dow Corning failed to inform the Court is that the Memorandum was not available for public dissemination until that day. Counsel representing claimants in related pending motions sent a letter to the Finance Committee seeking release of the Memorandum to them. See Exhibit 14 attached hereto, letter dated 6/9/06 from Leslie J. Bryan which was copied to counsel for Dow Corning. As soon as CAC member, Dianna Pendleton-Dominguez, was informed that the Memorandum could be released, it was. See Declaration of Dianna Pendleton-Dominguez, attached as Exhibit 15 hereto. Further, the CAC and Debtor's Representatives had discussions during the week following the issuance of the Memorandum to discuss possible resolution of the Disability A issue based on the facts contained in the Memorandum. Id. At no time during those discussions with the CAC and with Mr. Austern did Dow Corning disclose any concern that the facts in the Memorandum were false or that the methodology was flawed. It wasn't until 5:30 p.m. Eastern Time on Friday, June 16, 2006 that Deborah Greenspan contacted the CAC to inform them that Dow Corning intended to go forward with the hearing. Id. The Memorandum was filed on the next business day, June 19, 2006.

More importantly, Dow Corning was provided the Memorandum 10 days prior to its filing with the Court.[2] There was no prejudice to it by the timing of the filing. Ms. Pendleton-

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[1] The CAC is substituting a redacted version of the Memorandum as Supplemental Exhibit 13 because claimant identifying information was inadvertently disclosed in the Memorandum in Docket Number 408.

[2] As discussed in later sections, the Memorandum did not contain any new facts that had not been previously disclosed to the parties for the past year. Thus, it is hard to imagine how Dow Corning was prejudiced by the filing of the Supplemental Exhibit on June 19, 2006. If anyone was prejudiced, it was the claimants and counsel

Dominguez spoke with Ms. Greenspan immediately after the Exhibit was filed to make Dow Corning aware of the filing before she left the office or traveled to Detroit for the hearing. Id. Thus, Dow Corning has no basis to complain about when the Memorandum was filed. The CAC requests that the Court deny Dow Corning's request to strike the Supplemental Exhibit from the record.

2. The Memorandum is Probative and Relevant To The Pending Motions Concerning Disability A's Vocation or Self-Care Standard

In their shotgun effort to discredit evidence that contradicts their position, Dow Corning suggests that the Memorandum is not probative and was not "an effort to compile objective facts." Response at p. 1. They proceed to criticize all the things the Memorandum purportedly is not, but they neglect to mention the simple fact that the Claims Administrator – a neutral in the proceedings -- did exactly what the parties asked him to do, which is to investigate and confirm what the MDL 926 Claims Office did with regard to processing Disability A level claims and to offer suggestions for possible resolution. Over the past 18 months since the CAC's Motion was filed, Dow Corning never requested that a "statistically significant sampling" occur including when the parties agreed several months ago for Mr. Austern to prepare a report for the parties. Indeed, to conduct such a time-consuming and expensive project is simply not necessary when every source for the past year that has investigated the Disability A processing standard reported that the standard of "vocation or self-care" was applied by the MDL 926 Claims Office. Moreover, every claim attached to the related pending motions – and every claim pulled by the Claims Administrator for review in preparation of his Memorandum -- documented that the claim was approved by the MDL 926 Claims Office based solely on vocational disability. In the face of dozens of examples and overwhelming evidence of approved vocational only Disability A claims, a statistically significant sampling (which would be paid from the limited fund established for claimants) was simply not necessary and was never requested by Dow Corning.

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representing them in the related pending motions who were not provided the Memorandum earlier. They, however,

A. Sources of Approved Vocational Only Disability A Claims

First, dozens of approved Disability A claims from the MDL 926 Claims Office were attached as exhibits to motions, all of which were approved based on vocation alone. The Memorandum confirms that the Claims Administrator pulled numerous approved MDL Disability A claims and confirmed that they were all approved based on vocational disability only. He stated:

> A review of the MDL files the SF-DCT has been given supports the statements in the previous bullet point. **Indeed, it is almost impossible to find an MDL claim processed prior to the Judge Pointer Order where a claimant was denied Level A compensation because the claimant did not have a loss of both vocation and self-care.**[Footnote 8: By way of example, the following SF-DCT claims were each awarded ACTD Level A compensation by the MDL with evidence of a loss of only vocation (and no evidence of self-care activities): SID Nos. 6218573, 6202638, 0299076, 6187603, 6187211, 0963517, 0238238, 0268859, 6241478, 0227847.]
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> So ingrained was the MDL practice of looking to *either* vocation *or* self-care in awarding Level A disability that even after Judge Pointer's Order, for a period of several months stretching well into the first quarter of 1998, the MDL continued to make Level A awards based on *either* vocation *or* self-care activity loss. [Footnote 9: MDL Claim [number redacted] and MDL Claim [number redacted] were approved and paid after the date of Judge Pointer's Order, and each claim was awarded Level A ACTD compensation with evidence of a loss only of vocation activities.]

See Supplemental Exhibit 13 at p. 6 (emphasis added).

Second, the successor MDL 926 Claims Administrator reported in letters to the MDL Court, Chief Judge U.W. Clemon, dated April 19, 2005 and September 7, 2005 that the SF-DCT was not applying the Disability A standard that had been applied to "over 95%" of disease option 1 claims processed in the Revised Settlement Program. See Exhibit 16 attached hereto, copies of the letters.[3] The Memorandum similarly confirms that, "The MDL had processed and approved approximately 99% of all of the ACTD Level A claims" using the standard of "vocation or self-care." See Supplemental Exhibit 13 at p. 7.

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have not complained about the delay.

[3] Both the CAC and the Debtor's Representatives were provided copies of these letters in September 2005.

Thereafter in 2005, an outside claims audit was performed on claims processing by the SF-DCT. The claims auditor noted that the Disability A definitions had changed over time, including after the entry of a claimant-specific appeal in late 1997. See Exhibit 17 attached hereto, excerpt from the "Report on the Audit of The Processes and Procedures of The Settlement Facility – Dow Corning Trust," dated July 2005. The findings with regard to the Disability A issue provide that:

> **Level A Disability.** The Audit Team found that changes to the Annotations have been made over time. In 1997 at the MDL, Judge Pointer indicated that the claimant must demonstrate total disability in both areas.

Id. at p. 33. The Memorandum confirms that "well into the first quarter of 1998" – six months after the claimant-specific appeal by Judge Pointer – a processing change was made by the MDL 926 Claims Office changing "vocation or self-care" to "vocation and self-care." See Supplemental Exhibit 13 at p. 6. Since virtually all Disease Option 1 claims had already been processed and no new Disease Option 1 claims were permitted in the Revised Settlement Program, the processing change had no real effect on claimants in the RSP.[4]

Fourth, the SF-DCT Claims Administrator wrote a memo to the parties on August 31, 2005 stating, "Fixed Benefit reviews [Disease Option 1] completed by MDL-926 prior to Judge Pointer's Order confirmed Level A, total disability on 'vocation or self-care.'" See Exhibit 18 attached hereto, Memorandum from D. Austern dated 8/31/05 at paragraph 5(a). The Memorandum of June 9, 2006 has identical language. See Supplemental Exhibit 13 at p. 6.

Finally and perhaps most telling, the SF-DCT's Monthly Claims Processing statistics reveal that the MDL 926 Claims Office approved 14.3% of Disease Option 1 claims at Disability Level A (Exhibit 11 to the CAC's Motion for Disclosure), whereas the SF-DCT has approved

[4] The Memorandum states at Footnote 5 on p. 4 that only **14** disease option 1 claims were processed and approved between 2000 and 2005 by the MDL 926 Claims Office.

less than 2% of new Disease Option 1 claims at the same level.[5] The June 9, 2006 Memorandum addresses this issue as well, noting the significant discrepancy in outcomes between the two claims facilities. See Supplemental Exhibit 13 at pp. 4-5. The percentage differences in outcomes on the Disability A claims between the two claims facilities is statistically significant, and the CAC is prepared to offer expert testimony to this effect. A statistical variance of 12% demonstrates that claims in the SF-DCT are not being processed in "substantially the same manner" as claims in the MDL 926 Claims Office as required by Section 403(a) of the Settlement Facility and Fund Distribution Agreement and as discussed in more detail below.

Dow Corning suggests that the statistical differences between the MDL 926 and SF-DCT approval rates are attributable to other facts such as deficiencies based on lack of documentation of disability or that the disability was caused by a non-compensable or pre-existing condition. But their allegation misses the point that the MDL 926 Claims Office undoubtedly issued these same types of deficiencies and yet approved 14.3% of disease option 1 claims at the Disability A level. They alone do not account for a 12% variance in the percentage of approved Level A claims, and Dow Corning has not presented any evidence to explain the variance. It also ignores the fact that the disease claims in the SF-DCT were not denied altogether; they were simply downgraded from Level A (100%) disability to either Level B (35%) or C (20%) disability. For example, in the SF-DCT Monthly Claims Processing Report attached as Exhibit 11 to the CAC's Motion (Docket Number 76), the SF-DCT approved "B" level or 35% disability claims 49% compared to 46% by the MDL 926 Claims Office. Similarly, the SF-DCT approved "C" level or 20% disability claims at 50% compared to 45% for the MDL 926 Claims Office. This affirmatively demonstrates that not all "A" level claims were denied as

[5] The Memorandum cites to the SF-DCT Monthly Claims Processing Reports that show 5% of Level A claims approved by the SF-DCT; however, when the "MDL pass-through claims" are removed from this number and only new Level A claims are considered, less than 2% of Disease Option 1 claims are approved at the A Level.

Dow Corning suggests, but were instead approved but at lower disability levels. The speculation offered by Dow Corning for the 12% variance is baseless and wrong. It also ignores the second part of the CAC's Motion, *i.e.*, setting aside the processing change from "vocation or self-care" to "vocation and self-care," the SF-DCT is more harsh in its review and standards for self-care than the MDL 926 Claims Office was in the Revised Settlement Program, as discussed in greater detail below.

The Memorandum submitted to the Court on June 19, 2006 is cumulative of the facts confirmed by the MDL 926 Claims Administrator and the outside claims auditor regarding how the MDL 926 Claims Office processed Disability A Level claims prior to the claimant-specific appeal order issued on September 30, 1997 by Judge Pointer. Dow Corning cannot claim prejudice based on the timing of when the Memorandum was filed since it had notice of all facts and information from other sources for at least one year prior to its filing. The Memorandum is also relevant, and indeed, addresses facts that are at the very heart of the dispute between the parties, i.e., it affirmatively answers the question posed in the CAC's motion about whether Dow Corning claimants are being held to a higher and more difficult standard for 100% disability claims than similarly situated claimants in the Revised Settlement Program.

B. SF-DCT's Re-Review of ACTD Claims

Several months ago, the SF-DCT Claims Administrator began a project to re-review the approximately 1,800 Disease Option 1 claims that were not approved for Disability Level A. Many of these 1,800 had been approved at lower levels of disability and compensation. While the project is not yet complete, the interim results are telling. The Claims Administrator has reported preliminary findings on the review of 414 of these claims:

- 47 errors or 11% of the 414 disease option 1 claims had errors in the SF-DCT's initial review and denial of the claim;
- 15 of of the 47 errors – or 3.6% of the 414 claims should have been paid at the Disability A level using the standard of "vocation and self-care" but were improperly denied;

- 140 claimants of the 414 – or 34% — would qualify for Disability A compensation based on vocational disability alone (identical to the standard applied to MDL 926 disease option 1 claims). Another 147 of the 414 – or 35.5% -- had disability statements based on homemaking activities alone which could qualify for vocational disability if the claimant did not otherwise work outside of the home; and
- 16 claimants of the 414 – or 3.9% would qualify for Disability A based compensation based on self-care disability alone (identical to the standard applied to MDL 926 disease option 1 claims).

See Exhibit 15, Declaration of Dianna Pendleton-Dominguez. The errors and claims that would qualify using "vocation or self-care" account for 84.4% of the claims in the re-review, leaving slightly more than 15% of the claims that would remain deficient for other reasons. Dow Corning's claim that the 12% variance in outcomes on Disability Level A between the SF-DCT and the MDL 926 is based on lack of adequate documentation, pre-existing or non-compensable conditions, etc. is simply not supported by any evidence. In fact, the statistics from the re-review project prove otherwise.

The Claims Administrator also reported that a significant percentage of the 414 claims completed thus far – or 69% -- relied on disability statements from Qualified Medical Doctor reports ("QMD Reports") written in 1994 for the original global settlement. Id. This is significant because claimants relied on the language in the Joint Disclosure Statement during ballot solicitations in 1999[6], which was approved by the Bankruptcy Court as an accurate summary of the Plan, stating that they could use their existing disease submission in the original global settlement and would not have to seek new evaluations in the Dow Corning bankruptcy. The fact that 69% of the claims being re-reviewed are based on disability evaluations written in 1994 further supports the CAC's position that claimants, attorneys and doctors all understood the

[6] This language was re-stated on various websites including that of the Tort Claimants' Committee and Dow Corning. See Exhibit 15A attached hereto.

plain meaning of the language "vocation or self-care" to mean what Webster's dictionary defines as "a coordinating conjunction introducing: a) an alternative [red or blue] or the last in a series of choices, b) a synonymous word or phrase [oral, or spoken]." See Exhibit 20 attached, excerpt from Webster's New World Dictionary and Thesaurus. The simple fact is that "or" really means "or." It does not mean "and."

3. **Dow Corning's Criticisms Of The Memorandum Are Without Merit**

Dow Corning criticizes the Claims Administrator because he relied on facts developed from interviewing "[a]ll SF-DCT employees who were formerly employed at the MDL ...." See Response (Docket Number 410-1) at p. 2-3, and Supplemental Exhibit (Docket Number 408) at p. 6. Significantly, the Claims Administrator did not interview just some of the former MDL employees, he interviewed all of them that are at the SF-DCT. And to a person, each and every one told him that "prior to Judge Pointer's Order ..., the MDL awarded Level A compensation to ACTD claims where the claimants' disabilities resulted in an inability to perform all or none of the activities of self-care *or* vocation." See Supplemental Exhibit 13 at p. 6.

If the Court accepts Dow Corning's criticism, then 25-40% or more of the annotations currently in place at the SF-DCT must be treated as similarly suspect since they were based on the nurse's memories and experience at the MDL 926 Claims Office. Dow Corning has been on notice for years that the SF-DCT's annotations were developed based on nurse reviewers' memory and experience. In fact, this issue came up in the "true-up" arbitration proceedings in 2002 - 2003 over the use of materials provided by the MDL 926 Claims Office to the SF-DCT. In the brief jointly submitted by Dow Corning and the Tort Claimants' Committee, Dow Corning used the fact that the SF-DCT developed its own annotation book based on oral histories of the former MDL employees to assert that it should not have to pay the MDL 926 any additional funds for use of their annotations. At page 13 of the joint submission, Dow Corning wrote, "In short, the SF-DCT was not provided with a blueprint for processing and evaluating the claims. Ultimately, the staff of the SF-DCT has developed its own manuals using a combination of the

memoranda it was able to cull from the boxes and disks **and from interview of former MDL 926 Claims Office staff.**" See Exhibit 21 attached hereto at p. 13, excerpt from "Arbitration Statement of Dow Corning Corporation and the Tort Claimants' Committee Regarding the Settlement Facility – Dow Corning Trust Access To MDL 926 Claims Office Materials, 11/1/02 (emphasis added). Further, Dow Corning noted that, "The SF-DCT Claims Operations group spent the last year sorting through the MDL 926 Claims Office database documents and **interviewing former MDL 926 Claims Office employees in an attempt to re-create MDL 926 Claims Office Processing Protocols.**" Id. at p. 13 (emphasis added).

In addition to having affirmatively relied on the oral histories of the former MDL employees when it suited them, Dow Corning failed to voice a single objection to their reliability when claims were processed the last three years in reliance on these same oral histories. It is disingenuous for Dow Corning to now suggest that oral history documenting the Disability A processing standard is unreliable when it no longer suits their purposes, particularly when all external sources such as the outside claims audit in 2005 have corroborated their accuracy.

Dow Corning further complains that the Memorandum should not be given any weight because Mr. Austern did not interview the initial MDL 926 Claims Administrator, Ann Cochran. The implication is that Ms. Cochran has information different from all her former employees who now work at the SF-DCT. This is simply not true as Dow Corning is well aware. In fact, Dow Corning noted in the 2002-2003 true-up arbitration proceedings that Ann Cochran declined to review or comment on the annotations stating, "I will not be reviewing or commenting on your disease deficiencies, NOS'es, etc. Please do not send me any more material." Id. at p. 13. Knowing that Ms. Cochran had declined to review the SF-DCT's materials in 2002, it is misleading for Dow Corning to suggest that David Austern should have been successful in doing just this in 2006 when he has never met her, and long after Ms. Cochran had resigned from her post as the MDL 926 Claims Administrator.

Moreover, when the outside claims audit was conducted in 2005, the audit team – who

had worked closely with Ann Cochran in the MDL 926 – did interview her and specifically asked her about "areas related to the development of the Annotations." See Exhibit 17 at p. 14. The outside audit concluded, as noted above, that the Disability A standard changed to require total disability in both areas of vocation and self-care following the 1997 claimant-specific appeal order by Judge Pointer. Id. at p. 33. In addition, as noted above, the successor MDL 926 Claims Administrator acknowledged that over 95% of RSP disease option 1 claimants were processed using a standard different that the standard currently applied by the SF-DCT. See Exhibit 16. Dow Corning's complaints about the reliability of the facts in the Memorandum are groundless.

Third, Dow Corning seeks to strike the Supplemental Exhibit on the grounds that it is unsworn hearsay. See Objection (Docket Number 409) at p. 2. Of great concern and surprise to the CAC, Dow Corning then suggests – without any basis for such a request – that it should have an opportunity to depose the Claims Administrator.[7] Id. A deposition to certify the Memorandum as a business record exception to hearsay under Federal Rule of Evidence, Rule 803(6), is unnecessary. Rule 803(6) expressly provides an exception to the hearsay rule for business records and a process to certify them as such:

> A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

It is clear that the Memorandum meets the requirements of Rule 803(6) as a business record of the SF-DCT. See Exhibit 22 attached hereto, Declaration of David Austern providing the

[7] Dow Corning is hard pressed to claim that it needs discovery of the Claims Administrator. After the CAC filed the Supplemental Exhibit on June 19, 2006, Dow Corning sought what amounts to unilateral discovery of the Claims Administrator by tracking him down in New York where Mr. Austern was on other business and insisting he sign a

certification that complies with Rule 902(11) and 803(6). Dow Corning's objection based on hearsay grounds must be denied as should their request to depose Mr. Austern.

4. Judge Pointer's 9/30/1997 Ruling in a Claimant-Specific Appeal

Finally, Dow Corning has misrepresented the significance of the claimant-specific appeal by Judge Pointer. Contrary to what Dow Corning stated in its Response and during argument on June 20, 2006, the issue of whether the standard was "vocation or self-care" versus "vocation and self-care" was not briefed by the parties that had negotiated this language. In fact, the parties do not know what issue was briefed or was before the court in the claimant-specific appeal because the underlying claim submission and appeal documents were never made available to the parties. Either the appeal had nothing to do with the and/or issue – which may very well be, or Judge Pointer simply made a mistake when he stated that "the Claims Administrator had consistently applied the language respecting disability level A for other claimants as she has with respect to Ms. [name redacted] claim." No other conclusion can be reached and, in fact, Mr. Austern found likewise in his Memorandum. He states with regard to Judge Pointer's belief that claims have consistently been processed as "vocation and self-care" that, "The evidence is to the contrary...." See Supplemental Exhibit 13 at p. 5-6.

Of greater significance is that when the Joint Plan was negotiated, agreed-to and voted on by implant claimants, no one knew that there had apparently been a major, 180 degree change in how Disability A level claims were reviewed. All but 2 of the TCC members were involved in the MDL 926 proceedings, and none had any knowledge that the processing rules had changed nor would they be expected to know. By the time of the confirmation hearing in 1999, virtually all disease option 1 claims had been reviewed and approved under the "vocation or self-care" standard. Second, there was no announcement or notification by the MDL 926 that its processing rules were being changed such that claims that previously had been approved

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letter prepared by Deborah Greenspan, counsel for Dow Corning. We find Dow Corning's behavior objectionable and move that the letter attached to the Response (Docket Number 410) be stricken on grounds of hearsay.

would no longer be approved. If such knowledge had been made available, the parties could have sought a clarification directly from Judge Pointer and/or addressed this issue in the negotiations.

When the Joint Plan was voted on in 1999, claimants were told that their claim would be treated precisely the same way claims had been treated by the MDL 926 Claims Office. See Exhibit 15A attached to the Declaration of Dianna Pendleton-Dominguez, a printout of Dow Corning's website for implant claimants as of 3/4/1999. Dow Corning promoted the Joint Plan and induced claimants to vote for it stating that "Women may qualify for disease payments by meeting one of two sets of criteria: 1) the criteria contained in the proposed 1994 Original Global Settlement of all breast implant claims which is equivalent to the Fixed Benefit Option of the current Revised Settlement Program (RSP); or 2) criteria contained in the RSP for the Long Term Benefit Option." Id. Further, Dow Corning stated that, "Claims will be processed through the Dow Corning Settlement Program Claims Office using an already existing claims processing facility. The facility will utilize the same processing procedures and personnel as the claims office established in the Multi-District Litigation Court under the Revised Settlement Program (RSP)." Id. Dow Corning also promoted that claimants could rely on their existing documentation obtained for the 1994 global settlement. Id. These same statements were made in the Disclosure Statement mailed to claimants in early 1999 during the vote solicitation process.

As a result, over 90% of breast implant claimants who voted on the Joint Plan voted to approve it. When claim forms were mailed in 2003, the Claimant Information Guide booklet contained the same "vocation or self-care" language in the Disease Claimant Information Guide and in specific questions and answers about the standard to qualify for Level A disability. The Claimant Information Guide did not inform claimants that the processing standard for disability A claims had been changed and were now much more difficult such that most Level A claimants in the MDL would not be approved for the same compensation by the SF-DCT. In fact, claimants

were told that they could rely on their existing disease evaluation from the global settlement and would not have to be re-evaluated under any new criteria, just as Dow Corning had promised in 1999 when the balloting and vote solicitation were ongoing.

The CAC disputes any claim by Dow Corning that it was aware that the processing rule had changed for Disability A claims. First, they did not have direct access to claims results like TCC members did with regard to their clients. Second, as noted, the MDL 926 never published anything stating that the Disability A standard had changed, and changed so dramatically that outcomes would be different between the two claims offices. If plaintiffs' lawyers intimately familiar with submitting claims were not aware of this change, it is virtually impossible to imagine that Dow Corning would have had greater knowledge. If Dow Corning did have such knowledge and the TCC did not, then there clearly was no meeting of the minds with regard to the criteria that would apply to Dow Corning claims.

We also note that Dow Corning's expert, Fredrick Dunbar, presented evidence during the confirmation hearing in 1999 (two years after the claimant-specific appeal in the MDL) that the adequacy of funding for the Joint Plan was based on the substantial similarity of claims outcomes and percentages on disease, rupture and explant claims. See Exhibit 19 attached, excerpts from Tabs 2 and 3 from the exhibits to the testimony of Fredrick Dunbar prepared for the confirmation hearing in 1999. In both of the attached Dunbar charts, Dr. Dunbar estimated the number of claims likely to be approved and paid in the Dow Corning Plan based on the RSP (MDL 926) claims approval statistics. Significantly, he relied on the same approval rate for disease option 1 Disability Level A claims -- 14.3% -- and projected that 4,909 Disease Option 1 Disability Level A claims would be approved and paid, *and* that the $2.35 billion (NPV) funding commitments were more than adequate to pay claims based on a 14.3% approval for "A" claims.[8] Id.

[8] Tab 2, for example breaks out all disease claims in both disease options 1 and 2. Approved disease option 1 claims account for 23.61% of all approved benefit claims including claims for rupture, explant, expedited release, etc.

All evidence points to the undeniable conclusion that Dow Corning was not aware of any processing change either, and that they are merely trying to capitalize on a newly discovered change in processing rules – a change that was based on a mistaken assumption by Judge Pointer – that results in a large majority of claimants in the Settlement Facility being paid at significantly lower amounts than their counterparts in the Revised Settlement Program (thus saving Dow Corning money in funds they will not have to pay into the Trust). For example, in 2001, Dow Corning responded to a question from the then Claims Administrator, Wendy Trachte-Huber, stating, "We do not believe that Judge Pointer issued an order changing the wording of the disability guideline." See Exhibit 12 to the CAC's Motion (Docket Number 76). Second, also in 2001, the parties prepared a document for use by the SF-DCT (and later the Independent Assessor) that compared the criteria in the Revised Settlement Program with that in the Joint Plan. See Exhibit 23 attached, excerpt from RSP Comparison Document dated 2/7/2001. In the section entitled, "Disease – Evaluation of Disease Options I and II: Substantive Criteria," Dow Corning wrote that:

> Substantive criteria are **precisely the same** as in the Revised Settlement Program. **The Joint Plan expressly intends that all evaluation protocols for the disease and disability criteria and definitions shall apply and be used by the Settlement Facility in processing Disease claims.**

Id. at p. 15 (emphasis added). The only new provision listed for the entire disease criteria section is the inclusion of the tolling language for Disease Option 2 claims. Id. In fact, under the

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Within disease option 1 alone, the breakdown of claims approved at Level A, B and C/D are as follows: A claims are 14.4% of all A Level claims approved in disease option 1 and 3.4% of all claims approved overall (including explant, rupture, etc.) Level B claims are 43.1% of approved disease option 1 claims and 10.17% of all types of benefit claims approved, and Level C claims are 42.5% of approved disease option 1 claims and 10.04% of all types of benefit claims approved. These percentages match to the numbers cited in the SF-DCT's Monthly Claims Report comparing percentages of approved claims by category between the MDL 926 and the SF-DCT. The fact that Dow Corning's own expert, Dr. Dunbar, relied on and projected funding adequacies of the Dow Corning Settlement Trust based on the same approval rate of disease option 1 Disability level A claims in 1999 – two years after the claimant specific appeal in the MDL 926 – this should dispel any doubts about what Dow Corning believed the standard was in 1999. Further, it should dispel any suggestion by Dow Corning that the Disability A claims should not be processed using the "vocation or self-care" standard because of concerns about the "limited funds" of the Trust. Dr. Dunbar's expert testimony in 1999, which the Bankruptcy Court, the District Court and the Court of Appeals all found credible, affirmatively demonstrates that funding to pay Disability A claims at the same percentage as the MDL 926 is financially feasible.

section entitled "Disease – Types of Deficiencies," Dow Corning agreed that they would be the "Same as in the Revised Settlement Program." Id. at p. 17. No new type of deficiency was listed for claimants whose total disability was based solely on vocation. This is consistent with the list of 16 deficiency codes contained at Section 7.06(d) of the Claims Resolution Procedures, Annex A to the SFA, none of which note a deficiency for Level A Disability claims based solely on vocational disability.

The parties had no notice of the claimant-specific appeal and no opportunity to seek clarification from Judge Pointer. If Dow Corning did have notice of the change, it did not disclose this at any time during the negotiations, the confirmation hearing, the Disclosure Statement and balloting process, or when claim forms were mailed. Their failure to disclose a material fact to claimants during balloting would render the vote suspect and possibly null and void. The more likely scenario is that Dow Corning did not know that the annotation had been drastically changed in the MDL 926 when the Plan was finalized. But when it was notified of the change years later, it saw an opportunity to save tens of millions of dollars (and perhaps more) from the funding stream it was obligated to pay into the Trust by disputing what standard was applied to Disability A claims. For every "A" level claim that is denied based on the processing change, Dow Corning can save $30,000 from its funding obligations. This is because once the Initial Payment is depleted, Dow Corning is obligated to pay money into the Trust only when claims are approved. For example, just considering 1,800 claims currently being re-reviewed by the SF-DCT today, if 37% are approved based on vocational disability only, this would result in a net additional payment from the Trust of $20 million. Applying this statistic to the larger group of claims yet to be reviewed, and it becomes apparent that what is driving Dow Corning's position is not a principled position on the issue, but the possibility of saving tens of millions of dollars for itself rather than paying it to claimants as it is contractually obligated.

The parties had an agreement that claims would be processed in "substantially the same

manner" as claims in the RSP. See Settlement Facility and Fund Distribution Agreement at Section 4.03(a). Dow Corning should not be permitted to evade its contractual obligations by creating a false issue, further delaying payments to claimants who waited almost a decade in bankruptcy before their claim was reviewed. The CAC respectfully requests that this Court order the SF-DCT to apply the same MDL 926 standard that was applied to 99% of disease option 1 claims for Bristol, Baxter and 3M claimants.

5. The SF-DCT's Application of the Self-Care Criteria Is More Harsh Than The MDL-926 Claims Office

The CAC has submitted evidence that the SF-DCT is processing claims for 100% self-care disability more harshly and more strictly than the MDL 926 Claims Office. During argument on June 20, 2006, Mr. Hornsby provided examples of two Disability A level claims processed by the SF-DCT that were rejected because they did not meet the high standard of 100% self-care disability. See Exhibits 24 and 25 attached hereto. For example, the disability statement in Exhibit 24 states that, "Over time, the patient has declined to the lowest level of existence, as far as being able to do anything for herself, and is assisted on a daily basis by her husband and other family members, even for her most basic needs of daily living, including dressing, undressing, walking, sitting, standing, getting ready for bed, cooking, doing laundry, etc., etc." Her treating doctor further supplemented the report five weeks later stating:

> Please be advised that I have requested from [name redacted] a detailed description of her self-care activities of daily living, and the first thing she told me is that, for the past one month, or so, she has been practically in bed most of the time, because of extreme fatigue, associated with her basic disease process. Ms. [name redacted] states that she requires assistance from her family for all of her basic needs of daily living, including getting out of bed in the morning, getting ready for bed at night, dressing, undressing, bathing, eating and toileting. In addition, she cannot wash her hair and requires help and assistance putting her stockings on, as well as putting her bra in place.

Despite these explicit descriptions of the claimant's self-care activities, the SF-DCT stated that no self-care activities could be credited because the claimant could do these activities with assistance. When the CAC later brought the claim to the attention of the Claims Administrator,

he reversed the nurse reviewer's decision. Similarly, in Exhibit 25, the claimant's disability questionnaire indicated that she could not dress herself when her hands, fingers and wrists were swollen, could not hold a blow dryer up long enough to dry her hair, needed help going to the bathroom, needed a nurse to help her with bathing because of pain and instability, and needed help from her family with housework. Astonishingly, the Notification of Status letter stated, "you did not mention the reason(s) why you cannot hold a blow dryer, the type of help needed when going to the bathroom, and why you need help with the housework." Accordingly, her Disability A claim was denied. Again, the CAC intervened and the Claims Administrator agreed that the claim should have been paid at the A level. But it is simply not reasonable to expect the CAC to intervene in each and every such claim denial – or for claimants who are 100% disabled and unrepresented to pursue an appeal (and further tax the resources with administrative costs chargeable to the limited fund) when the problem could and should be corrected at the review level. Claims containing this level of specificity on self-care issues were approved and paid at Level A by the MDL 926 Claims Office[9] and, in accordance with SFA Section 4.03(a), they should be paid by the SF-DCT.

6. Summary

Every document provided to claimants from 1994 to 2004 – including the original global settlement documents and claim forms, the RSP Notice and claim forms, the Disclosure Statement and the Joint Plan and claim forms – included the language that the standard for Disability A level claims was "vocation or self-care." All evidence obtained by numerous different sources confirms that 95-99% of all disease option 1 claims in the MDL were

[9] For example, an annotation adopted by the MDL 926 Claims Administrator on September 16, 2004 states that, "The settlement's definition of total disability in the area of self-care describes a person in an 'assisted living' situation. The claim documentation must answer these questions: Can she get dressed without help? Can she take a bath or shower and go to the toilet alone? Can she perform her usual grooming tasks (wash her face; brush her teeth and hair, etc)? Can she feed herself? (Remember that shopping and cooking is [sic] homemaking, not self-care activities). Unless the answer to at least two of these questions are [sic] clearly 'no', the claimant cannot be approved at level 'A'." See Exhibit 18 at paragraph 5(a)(iv). The two claims described above clearly should have

processed and approved based on vocational disability alone, or self-care alone, not vocation and self-care as is currently being applied by the SF-DCT. And all evidence produced shows that the parties expressly intended that claims would be processed in "substantially the same manner" as the MDL 926 Claims Office unless the SFA, CRP or Section 4.03 direct otherwise. Nothing in the SFA, CRP or Section 4.03 provide otherwise, as acknowledged by DCC in the RSP/SF-DCT comparison document. Changing the meaning of the word "or" to mean "and" materially and substantially alters the Disability A standard and the outcomes such that claims approved by the RSP are rejected by the SFDCT. This violates Section 4.03 and the basic premise of similar outcomes bargained for in the Joint Plan.

The CAC's original motion requested that the Court order the disclosure of substantive criteria being applied by the SFDCT that changed the claims criteria in the Plan Documents. That disclosure has now occurred, and that request is therefore moot. The CAC's supplemental motion asked the Court to order that Dow Corning settling claimants – who have waited for over a decade to have their disease claims processed – have their claims processed under the same standard that BB3 women enjoyed. We reaffirm this request, and urge the Court to act promptly to allow long-suffering claimants the ability to receive full compensation that the Plan promised. While the CAC firmly believes that furnishing processing guidelines will greatly assist claimants, this alone will not suffice with regard to the Disability A level. Claimants who relied on the guidelines in 1994 and thereafter will be greatly prejudiced unless the Court directs that the "vocation or self-care" standard be applied by the SF-DCT. Simply furnishing guidelines on the Disability A Level do not rectify the injustice of having their claims treated under a much harsher, more difficult standard than was ever contemplated.

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been approved at Level A since both claimants documented at least two, if not more, areas where they could not perform self-care activities without assistance.

Respectfully submitted,

FOR THE CLAIMANTS' ADVISORY COMMITTEE

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Reply to the Response (Docket Number 410) and Objection (Docket Number 409) of Dow Corning to the Notice of Filing of Supplemental Exhibit to was electronically filed with the U.S. District Court for the Eastern District of Michigan, Southern Division today, June 29, 2006, and a copy of the same will be sent to the Debtor's Representatives and Claims Administrator via electronic mail on June 29, 2006.

/s/
Dianna Pendleton-Dominguez