UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	**Case Number 00-00005-DT**
	§	**(Settlement Facility Matters)**
	§	
DOW CORNING CORPORATION	§	**Honorable Denise Page Hood**
	§	
Reorganized Debtor.	§	

CLAIMANTS' ADVISORY COMMITTEE'S RESPONSE OPPOSING THE MDL 926 SETTLEMENT FUND'S MOTION FOR RESOLUTION OF CLAIMS AGAINST SETTLEMENT FACILITY-DOW CORNING TRUST PAYMENTS TO CLAIMANTS

TO THE HONORABLE DENISE PAGE HOOD:

The Claimants' Advisory Committee (the "CAC") files its Response Opposing the MDL 926 Settlement Fund's Motion for Resolution of Claims Against Settlement Facility-Dow Corning Trust Payments to Claimants, and states as follows:

I. SUMMARY POSITION AND FACTUAL BACKGROUND

1. When the Court entered its *Order Pursuant to Section 3.03 of Exhibit 1 To The Stipulation and Order Approving Lien Resolution Procedures* (June 18, 2007, Docket #537) ("Order"), it was expressly agreed by the parties and ordered by the Court that the motion to be filed by the MDL 926 Settlement Fund would address one, and only one, issue as plainly stated in paragraph 3 of the Order:[1]

> It appears that there is a common threshold issue that is applicable to all lien claims asserted by the MDL-926 Settlement Fund, that is, whether the MDL-926

[1] The Order was the subject of discussion in a call with the Court on May 22, 2007. In that call, the MDL 926 Settlement Fund's escrow agent suggested that the initial motion should address both the common threshold legal issue and each of the 43 individual claimant lien issues, but this approach was expressly rejected by the Court. Thereafter, the representative committees in the Dow Corning case and MDL 926 exchanged drafts of the proposed Order and submitted an agreed version to the Court on June 8, 2007. *See* Exhibit 1 attached hereto, email from E. Hornsby to the Court with copies to the MDL 926 Settlement Fund's escrow agent and others, dated June 8, 2007. The proposed agreed order, which was adopted without change by the Court, limits the scope of the motion to the common threshold legal issue of whether the MDL 926 Settlement Fund has standing or a legal basis to assert the "liens" in question.

> Settlement Fund has standing or any legal basis to assert a lien against Settling Claimants in the Dow Corning case. [Emphasis added.]

Despite this clear directive, the MDL 926 Settlement Fund ("Settlement Fund") elected to disregard the Court's Order, filing a motion that is completely silent on the standing issue, and instead pointedly addressing claimant specific lien issues in a manner that was expressly rejected by the express language in the Order.

2. By disregarding the clear directive of the Court, the MDL 926 Settlement Fund's motion presents a dilemma for the 43 individual claimants to whom the Order applies and their counsel as well as the CAC in filing this Response: Should claimants and the CAC respond to address each of the 43 individual claimant lien issues that were impermissibly argued by the Settlement Fund in violation of the Order and by doing so, essentially leap frog over the standing issue as the Settlement Fund has done? Its motion is, after all, silent on this issue and, in fact, is styled as a "motion for resolution" of the liens it filed against certain claimants. Or instead should claimants and the CAC file a response to the common threshold issue as required by paragraph 3 of the Order and risk potentially waiving any ability to respond to the scurrilous and unsubstantiated allegations in the motion? The CAC submits that the correct approach is the one embodied in the Court's Order, and, while we will briefly touch on claimant issues generally to illustrate a point related to the legal issue before the Court, it would be improper, premature and unproductive to address each of the myriad claimant specific lien issues in any greater detail at this preliminary stage. This is why the Order did not require individual claimant responses and objections to the Proof of Lien forms pursuant to section 4.02 of *Exhibit 1 to Amended Stipulation and Order, Procedures For The Review of Asserted Lien Claims Against Settling Implant Claimants* (June 30, 2005, Docket #169) ("Lien Resolution Procedures"), but instead directs the CAC to assist in coordinating a singular response on the threshold legal issue. If, and

only if, this Court determines that the MDL 926 Settlement Fund has standing or a legal basis to assert the so-called "equitable liens" would claimants then be required to submit an objection and defense to the specific lien allegations made against them pursuant to section 4.02 of the Lien Resolution Procedures. The "motion for resolution" of the liens is impermissibly and prematurely filed and all allegations regarding individual claimant liens or their responses pursuant to section 4.02 of the Lien Resolution Procedures should be disregarded.

3. To examine the threshold standing issue, it is important to determine exactly what entity is asserting a right to recover a portion of the claimants' awards from the Dow Corning Settlement Trust. The "Proof of Lien" form and the motion before the Court were filed by the MDL 926 escrow agent purportedly on behalf of the MDL 926 Settlement Fund. The CAC is not aware of any document or order of the MDL 926 Court that empowers the escrow agent to take legal action against claimants on behalf of the MDL 926 Settlement Fund. To the contrary, the order defining the terms under which the escrow agent is to serve makes clear that his duties are related solely to the investment and custody of money placed into an escrow account supervised by an "Investment Committee" and the MDL 926 Court. *See* Exhibit 2 attached hereto, "Order" in Case No. CV 94-P-11558-S, MDL 926, dated Nov. 23, 1994. As will be demonstrated below, there is nothing to indicate the Investment Committee authorized the escrow agent to act, nor are we aware of any order directing the escrow agent or MDL 926 Settlement Fund to pursue litigation against its former claimants in a judicial district and forum not its own. Indeed, the plain language of the operative document appears to preclude such independent action by the escrow agent. *Id.* at ¶ (vi), p.6 ("In carrying out its duties, the Investment Committee and its members shall act by unanimous decision to the extent practicable.") Similarly, the "Settlement Fund," to which the motion refers is not a "trust" in the

form that the Court administers in the Dow Corning case, but merely a bank account that is periodically funded as claims are approved by the defendants in the Revised Settlement Program ("RSP"). It is not a separate legal entity that is empowered to take legal action on behalf of anyone, including the RSP defendants, against the very claimants that the fund was established to compensate. As such, the escrow agent simply does not have standing or authority to act in the dual and conflicting capacities presented in the Dow Corning case: as an alleged Quality Control arm of the neutral MDL 926 Claims Office and as a collection arm of the RSP defendants seeking to recover money on their behalf. In itself, the "fund" has not sustained any loss capable of legal redress or recognition.

4. Similarly, it is equally important to discern who – or what entity – is actually the target of the asserted lien by the MDL 926 Settlement Fund. The MDL 926 Settlement Fund seemingly implies that its liens are against each individual claimant's recovery. The underpinnings of its argument, however, are contradictory. On the one hand, the MDL 926 Settlement Fund alleges that the claimants in question defrauded it when their RSP claim was processed 10 years ago, and that the fraud is somehow ongoing by the claimants' allegedly different submission of documents to the Dow Corning Settlement Facility, an entirely separate and distinct claims facility. Under the Dow Corning Settlement Program, fraudulent claims are not eligible for payment. If a claimant is not eligible for payment, she does not have an "Allowed Amount" and the Lien Resolution Procedures do not apply. As a result, the Alleged Lien holder cannot assert a lien or attempt to seize a payment from the claimant or the Dow Corning Settlement Trust. But the MDL 926 Settlement Fund is doing just that: it alleges that even though the claimants in question should not be eligible to receive a payment from the Dow Corning Settlement Trust, the Settlement Trust should nonetheless issue payment but do so

directly to it, the MDL 926 Settlement Fund. There is simply no statutory, equitable or common law basis to support the MDL 926 Settlement Fund's claim -- nor does it provide any -- that it or any other entity can intercept a right to payment directly from the Dow Corning Settlement Trust, particularly if the claimant is not eligible for compensation in the first place as the MDL 926 Settlement Fund alleges. Indeed, the Dow Corning Plan Documents expressly preclude the right to any person or entity to doing just this as is discussed in detail below and in the attached supporting Memorandum of Law.

5. The MDL 926 Settlement Fund, even if given the benefit of the doubt and accorded some legal status, has not identified any statutory, common law or equitable basis that would allow it to interject itself in a separate legal proceeding and settlement simply because the same claimants filed separate claims, against different manufacturers, on account of completely different implants, with two separate settlement facilities. Despite the Settlement Fund's insinuations that the two breast implant settlements and claims offices are somehow existentially and/or legally connected and should be treated as though they were one single claims facility, this is simply not factually correct or supported by the relevant documents upon which each facility was created and operates. When Dow Corning opted out of the global settlement and filed for Chapter 11 protection in May 1995, it did so <u>not before the MDL 926 Court</u>, but before the United States District Court for the Eastern District of Michigan. From this point forward, the global settlement was forever splintered into two separate and distinct legal proceedings – the RSP that proceeded forward before the MDL 926 Court, and the Dow Corning bankruptcy case that proceeded and was ultimately confirmed by the United States District Court for the Eastern District of Michigan. It does not matter for purposes of whether the "fund" has standing whether the criteria of the two settlements are similar, what draft documents in the Dow Corning

bankruptcy may have provided before they were revised and the Dow Corning Joint Plan went effective, or whether there are orders of the two courts allowing data to be periodically exchanged. Similarities in the terms of the settlement are irrelevant to the issue of whether there is standing or a legal basis for the alleged "lien" claims, or to whether legal standing could somehow be conferred by the *sua sponte* intervention of an escrow agent who from the documents under which he operates appears not to confer any such power, duty or responsibility. The undisputed fact is that the Dow Corning Settlement Trust is a separate and distinct legal entity from the MDL 926 Settlement Fund. It is supervised by a United States District Court that is not the MDL 926 Court, it has proceeded under a different procedural and legal basis as a Chapter 11 bankruptcy case, and it has completely separate claims processing offices, financial and investment managers, Claims Administrators, Finance Committee, Claimants' Advisory Committee and, of course, the debtor – Dow Corning. Simply because both settlements involve breast implants does not in and of itself authorize the MDL 926 Settlement Fund to interject itself into and direct how the Dow Corning Settlement Facility should conduct its Quality Control over claimants common to both settlements or to seize or place a hold on the compensation awards of these claimants pre-distribution on the guise that it has or was "invited to" file a "lien" against the claim, equitable or otherwise. The CAC therefore requests that the motion be denied on the ground that there is no recognizable legal basis for the relief sought by the MDL 926 Settlement Fund.

6. Finally, we believe it is important to express to the Court our deepest concern and dismay with both the derogatory tone and pejorative accusations made by the MDL 926 Settlement Fund in its motion. Claimants are repeatedly referred to throughout the motion by demeaning and disrespectful names ("double-dippers") and are alleged to have been overpaid or

received a "windfall" by virtue of their injuries from breast implants,[2] the Settlement Facility Claims Administrator is wrongly accused of withholding documents, hiding or shielding "Allowed Amount" claims from the MDL 926 Claims Office and/or Settlement Fund and violating this Court's orders,[3] and claimants and attorneys alike are accused – without any

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[2] Settlement payments made to claimants in the RSP are substantially lower than the amounts projected to be paid in the global settlement. Instead of receiving $200,000 for an ACTD Level "C" claim, an RSP claimant was forced to accept a 95% reduction in payment to a mere $10,000. Often, the RSP settlement amount did not cover the claimant's medical expenses for past, current and ongoing medical care for her injuries. It is simply wrong and highly inflammatory for the escrow agent to impose his own view of the adequacy of payment amounts and argue that these women have been "100%", that they have been overpaid or that they received a "windfall" for their breast implant injuries.

[3] The Settlement Fund claims that it is entitled to receive now, prior to the Court's ruling on whether there is standing or a legal basis to proceed further, claimant's responses and objections to the MDL 926 Settlement Fund's Proof of Lien forms from 2005. This is not accurate. As noted, in a May 22, 2007 conference call with representative committees of both settlements, this Court expressly rejected the notion that it would address individual claimant specific issues at this time and did not require individual claimants to file a response or objection to the Proof of Lien form submitted by the MDL 926 Settlement Fund in 2005. Despite this, the escrow agent sent a letter to the Dow Corning Claims Administrator on June 4, 2007 demanding that he produce copies of individual claimant responses to the Proof of Lien forms. *See* Exhibit B to the Settlement Fund's Motion, letter from E. Gentle to D. Austern dated June 4, 2007. The Dow Corning Claims Administrator responded by letter dated June 8, 2007 that a) given his existing travel plans, he would not be able to respond within the 14 days indicated by the MDL 926 Settlement Fund, and b) that the Dow Corning Settlement Facility stopped notifying claimants about the MDL's Proof of Lien forms shortly after Judge Frank Andrews recused himself in 2005. *See* Exhibit 3 attached hereto, letter from D. Austern to E. Gentle dated June 8, 2007. In other words, the Lien Resolution Procedures were suspended in 2005 before most claimants were ever informed that the MDL 926 Settlement Fund had asserted a lien, and other claimants who did receive such notice were not aware that there was a legal issue that needed addressed before there could be any determination on their individual claim.

A proposed agreed order was submitted to the Court on June 8, 2007 that limited the present motion to legal issues, not claimant specific factual issues. Unless and until the Court determines that the MDL 926 Settlement Fund has standing or a legal right to assert a claim and is the correct entity to receive confidential claimant documents and information, nothing can or should be shared with the MDL 926 escrow agent. Moreover, should the Court rule that the Settlement Fund is the proper party and has standing, which the CAC disputes, then claimant specific lien issues will be heard *de novo* as provided in paragraph 2 of the June 18, 2007 Order ("pursuant to Section 3.03 of Exhibit 1 to the Lien Resolution Procedures, the District Court shall hear the lien claims asserted by the MDL-926 Settlement Fund *de novo*."). Thus, claimants will be afforded an opportunity to respond to the lien claims now made against them and are not limited to whatever response may have been submitted in 2005.

The Settlement Fund further charges, without any documentary proof, that the Dow Corning Claims Administrator has not been forthcoming about the actual number of Dow Corning Settling Claimants who have an Allowed Amount and are thus subject to the Order of June 18, 2007 ("Given the failure of SF-DCT to comply with the Lien Procedures in other respects, MDL 926 cannot be sanguine in the belief that all of the Additional Current Liens are simply not ripe for payment."). MDL 926 Settlement Fund Memorandum at p. 10. Notwithstanding that the Dow Corning Claims Administrator provided clear and unequivocal information about this to the escrow agent in a letter dated June 25, 2007 along with an attached Excel spreadsheet, *see* Exhibit 4 attached hereto, email from D. Austern to J. Eliason, the escrow agent and CAC dated June 25, 2007 (chart with confidential claimant names omitted), the escrow agent persists in making these unsubstantiated, baseless and contradictory charges, i.e., the Settlement Fund alleges on one hand that the SF-DCT should "ripe" the claims for payment and grant them the status of having an "Allowed Amount" while simultaneously stating that the SF-DCT should not pay the claims

specificity or credible facts as required by Federal Rule of Civil Procedure 9 – of fraud and "selectively submitting different information to the RSP and the Dow Settlement Plan."[4] The Settlement Fund goes so far as to charge that attorneys "aided and abetted" claimants in the alleged deception scheme to recover more than 100% of the benefits due them. No one escapes blame for some alleged wrong in the eyes of the MDL 926 Settlement Fund (except, of course, the MDL 926 Claims Office) in its misguided attempt to distract the Court from the fact that the MDL 926 Settlement Fund does not have standing or any legal or statutory support to assert a lien against claimants or the Dow Corning Settlement Trust.

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because they are fraudulent. The dispute stems from the MDL 926 escrow agent's repeated failure to understand that the Dow Corning Lien Resolution Procedures are triggered <u>only</u> when a claimant has an "Allowed Amount" determined by the Settlement Facility. *See* Exhibit 1 to Lien Resolution Procedures (Docket #169) at § 1.01 ("These Procedures apply solely and exclusively to asserted lien claims against settling claimants. More specifically, these Procedures apply to disputes between: (1) Personal Injury Claimants who elect to settle their claim in the SF-DCT and whose claims have been reviewed and (1) determined to be eligible and (2) <u>had an Allowed Amount determined</u> ...."). Allowed Amount is defined at section 2.03 as "the amount of payment the SF-DCT has determined should be awarded a Claimant on his/her claim(s)." *Id.* It does not mean that a claimant has acceptable proof of a Dow Corning breast implant like the MDL 926 Settlement Fund mistakenly believes. A claimant that the SF-DCT has determined is not eligible or does not have an Allowed Amount cannot, be definition, go through the Lien Resolution Procedures. This was deliberately intended when the CAC and Debtor's Representatives established the Lien Resolution Procedures so that the Dow Corning Settlement Trust would not incur the expenses associated with resolution of a lien when the claimant was not due any funds from the Settlement Trust. The simple fact is that the SF-DCT has determined that the 17 additional claims identified and referenced by the MDL 926 Settlement Fund in its motion do not have an Allowed Amount and these claims therefore are not governed by the Lien Resolution Procedures.

[4] If the Court determines that the Settlement Fund has standing or a legal basis to assert a lien, which the CAC disputes, then and only then would individual claimants with the assistance of CAC be prepared to submit proof that 1) they <u>did</u> inform the MDL 926 Claims Office and produced proof of implantation to it that they had a Dow Corning breast implant <u>and</u> 2) the MDL 926 Claims Office and Dow Corning Settlement Facility relied on the <u>very same proof of manufacturer documents</u> when each claims facility processed the claim. In fact, the Dow Corning Settlement Facility had a copy of each claimant's MDL 926 claim file and reviewed it prior to issuing a Notification of Status letter about the claimant's implant history. The MDL 926 Settlement Fund is simply incorrect in stating that different proof of manufacturer documents were submitted to the two claims facilities. Other claimants are prepared to submit proof that they accurately informed the MDL 926 Claims Office that did not know who made their implant, despite their best efforts to uncover the manufacturer's name. It was only through explant surgery that occurred years after the RSP payment that they were able to have the implants examined and identified as Dow Corning, or they were able to identify the implant based on the significantly broader proof of manufacturer criteria protocols in the Dow Corning case such as unique identifiers, catalog numbers, sales data, brand names, protocols regarding pre-1971 breast implantations, lists of doctors who supplied affirmative statements about their exclusive use of Dow Corning breast implants, etc. This information was not available at the time that claims were submitted in the global settlement or RSP.

7. Turning to the claim of "purported fraud" itself, the premise underlying the Settlement Fund's accusations at face value is simply wrong. Despite the MDL 926 Settlement Fund's unsupported allegations, neither the RSP nor the Dow Corning Plan Documents contain any provision that payments to claimants are supposed to be capped at "100%" of the RSP compensation grid, something that the MDL 926 Settlement Fund pejoratively refers to as the "no double dip rule."[5] To the contrary, the Dow Corning Plan Documents expressly provide that approved claimants are eligible to receive 100% of the grid plus a 20% additional "Premium Payment" over and above the maximum RSP compensation grid for disease and rupture, thus negating the MDL 926's Settlement Fund's core contention in its motion. There are other examples where the plain language in the Dow Corning Plan Documents expressly allows claimants to recover more than 100% of the RSP compensation grid, *e.g.*, the multiple manufacturer reduction does not apply to claimants whose Bristol, Baxter or 3M implant contained only saline. See Dow Corning Settlement Program Claims Resolution Procedures, Annex A To Settlement Facility and Fund Distribution Agreement at § 6.02(d)(v), p Annex A-12. These claimants received 50% of the RSP compensation grid from the RSP and are eligible to receive 100% of the compensation grid in the Dow Corning settlement, thus the total recovery is 150% of the RSP compensation grid. Similarly, there are thousands of claimants who recovered more than 100% of the RSP grid in settlement of their opt-out claim with the RSP

[5] There is no language anywhere in the RSP Notice, claim forms, or Q&A booklets that references a so-called "no double dip rule" nor is there any language or policy stated in the RSP or any MDL 926 Court orders that a claimant with multiple implants by different manufacturers would be limited to the 100% payment amount of the RSP grid set by the RSP defendants. The RSP defendants have no power or authority to limit the amount a claimant can recover from other sources including from the Dow Corning Settlement Trust. The MDL 926 Settlement Fund's claim is also belied by several key facts: 1) some RSP claimants received the so-called 100% RSP grid payment and a payment from the Inamed settlement fund, the Mentor settlement fund and/or the Bioplasty bankruptcy distribution in MDL 926, and 2) claimants with approved claims in the RSP received more than 100% of the RSP compensation grid when the MDL 926 Court authorized a 2% "rebate" to be provided from excess money in the Common Benefit Fund. Since the escrow agent is also the paying agent for the MDL 926 proceedings (including those mentioned above), he surely was aware that claimants received multiple payments and that these payments totaled in excess of 100% of the RSP compensation grid.

defendants who, if their claim is approved by the Settlement Facility, will receive an additional payment from the Settlement Trust making their recovery in the two settlements in excess of 100%. Still others will recover more than 100% of the RSP payment because of the Dow Corning Settlement Program's recognition of stand alone rupture payments and enhanced severity claims for claimants with a Disease Option 1 claim. The Dow Corning Plan Proponents could have written in a limitation on the total payment amount a claimant in both settlements could recover since the Dow Corning Joint Plan was not submitted to the Court for confirmation until 1999, four years after the RSP was approved and payments disbursed. We did not. The Dow Corning Plan is clear: if a claimant submits documents showing that she is both eligible and has an approved benefit, the claim must be paid regardless of their payment amount in the RSP or in any other settlement whether breast implant related or not. The Joint Plan was not set up as or intended to be a quality assurance audit of claims processing performed by the MDL 926 Claims Office ten years ago and nothing in the Plan Documents supports the MDL 926 Settlement Fund's contention concerning this.[6] It is improper for the MDL 926 Settlement Fund to read or imply terms and provisions into the two settlement documents that affect claimants' legal rights that simply are not and were never intended to be included.

8. When the Court looks past the rhetoric and pages of irrelevant details and unsupported, inflammatory allegations made by the MDL 926 Settlement Fund, several

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[6] Indeed, if a claims audit were performed on claims processed and paid by the MDL 926 Claims Office over the past 12 years, errors would undoubtedly be discovered as they would be in any facility that processes tens of thousands of claims. If, for example, the Dow Corning Settlement Facility determines that a claimant has acceptable proof of a Dow Corning breast implant, it must pay her as such even though it may be aware that the MDL 926 Claims Office approved and paid the claimant for a Bristol, Baxter or 3M implant based on the same implantation surgery and the same submission of documents. This is because the proof of manufacturer requirements in the two separate settlements are not identical, were not written so that they would be perfectly "in sync" with the criteria of the other settlement, and were not developed in consultation of the other facility or its representatives. Indeed, in some instances, the proof of manufacturer criteria for the two settlements conflict. For example, the RSP considers any reference to "Cronin" to be a Dow Corning breast implant. Dow Corning, on the other hand, disputes this and will only recognize references to "Cronin" in medical records prior to 1971.

significant and undisputed facts are clear which support early dismissal of the allegations made in the motion:

a. There are 43 claimants whose "lien" claims have been consolidated for purposes of the determining the standing issue (and only the standing issue), not 60 as alleged by the Settlement Fund.[7]

b. The 43 claimants each have an "Allowed Amount" that has been approved by the Settlement Facility for immediate payment, meaning, as defined at section 2.03 of the Lien Resolution Procedures that the claims have been fully reviewed by the Dow Corning Settlement Facility and authorized for payment with no finding of fraud. Further, the allegations that claimants and their counsel defrauded the Dow Corning Settlement Trust – which are simply not true or supported by any evidence presented in the motion -- are irrelevant to the issue of the MDl 926 Settlement Fund's standing in the instant motion.

c. The MDL 926 Settlement Fund's "liens" are nothing more than thinly disguised attempts to take without proof or process individual claimant settlement payments approved in the Dow Corning case, in alleged satisfaction of unsupported general allegations that the release they gave to the RSP defendants ten years ago in exchange for a payment in that

[7] As noted earlier, the MDL 926 Settlement Fund improperly claims that the motion pertains to 60 claimants, not the 43 identified as having an "Allowed Amount" by the Dow Corning Claims Administrator. This is incorrect as the escrow agent well knows. The escrow agent was informed prior to filing the motion that the 17 additional claims simply are not ripe for payment at this time and therefore, the claimants do not have an "Allowed Amount" which is a prerequisite to invoking the Lien Resolution Procedures. *See* Exhibit 4 attached hereto.

It is also improper for the escrow agent to include the 17 additional claims in its motion and exhibits when the claimants and their counsel were not served with a copy of the motion and are not before this Court. The CAC moves to strike all references to these claims in the Settlement Fund's motion and exhibits.

settlement was somehow flawed.[8] The Dow Corning Lien Resolution Procedures are not, however, the correct procedural vehicle to do this, the MDL 926 Settlement Fund is not the allegedly aggrieved party at interest to pursue such a claim, and this Court need not entertain claims challenging the validity of the payments made to claimants by a separate settlement office ten years ago.

d. Efforts to attach, garnish or sequester the approved payments due the Dow Corning claimants or to attach, garnish or sequester funds from the Dow Corning Settlement Trust also fail on a threshold level because they violate a core principle in this case. Section 10.09 of the Settlement Facility and Fund Distribution Agreement provides that all funds held by the Settlement Trust are *in custodia legis* and are not subject to garnishment or attachment. The MDL 926 Settlement Fund does not have standing or authority to attach the settlement awards of claimants in the Dow Corning Settlement Program or to seek recovery from the Trust itself as it alleges in its motion.

e. By invoking "equity" to sustain a lien claim, the MDL 926 Settlement Fund inherently admits that there is no statutory or consensual lien upon which its asserted lien can rely. But even in equity its "lien" does not exist here. Equitable liens are recognized only where claimants (i) have somehow absconded with the exact same asset which is the subject of the

[8] Because the RSP was a "claims made" individualized settlement, the RSP defendants required each claimant to sign a "Release" of all claims against them for known and unknown injuries: "I understand that this release will remain effective even if my health worsens, I discover new or additional facts, or there are any changes in applicable law." *See* Exhibit 5 attached hereto, redacted copy of an "RSP Release."

asserted equitable lien, (ii) arises in circumstances where the asserted lien holder is directly suing the defendant, and (iii) the asset subject to the asserted lien is tangible and capable of being impressed with the subject lien. None of these required elements are present in the case of the 43 claimants in question. Illusory appeals to equity that are not supported by cognizable injury nor permissible under the law which interdict payments simply prolongs the delays suffered by these claimants. Neither Texas nor federal law will permit what is tantamount to an extraordinary prejudgment injunction, garnishment or attachment on this record. The MDL 926 Settlement Fund's motion should accordingly be denied for failing to state a claim.

II. SUMMARY OF LEGAL ARGUMENT IN MEMORANDUM OF LAW

A. The Motion Disregards the Court's Order That the Parties Address the Common Threshold Issue of Standing

9. The Settlement Fund's motion is defective as a threshold matter because it ignores the directive given to the parties by the Court in its Order of June 18, 2007: to address the common threshold issue of whether the MDL 926 Settlement Fund has standing or any legal basis to assert a lien against claimants in the Dow Corning Settlement Facility. Without standing to assert a lien claim, the "Proof of Lien" forms filed by the MDL 926 Settlement Fund must be dismissed, thus avoiding the need for the Court and claimants to address the merits and defenses of each individual lien claim. Despite this, the Settlement Fund elected to ignore the Court's Order, leap frog over the standing issue and engage in a detailed discussion concerning the merits of the individual liens it is asserting to drum up some alleged "equitable" basis for relief

that is otherwise prohibited. This is objectionable, and the CAC requests that all claimant specific references and allegations in the MDL 926 motion be stricken and disregarded as part of the briefing on the common threshold legal issue before the Court. Furthermore, inasmuch as claimant specific issues are not ripe to be briefed, it is premature for the MDL 926 Settlement Fund to demand that the Dow Corning Claims Administrator produce claimant's responses to the Proof of Lien forms that may have been submitted years ago before the CAC had an opportunity to interpose an objection on behalf of claimants. Should the Court rule that the MDL 926 Settlement Fund has standing or a legal basis to assert the lien, which the CAC disputes, then, pursuant to the Order, the Court will address claimant specific lien issues *de novo* as provided in the Order.

B. The Settlement Fund Lacks Standing to Assert a Claim Against the Dow Corning Settlement Trust and Claimants Therein

10. The MDL 926 Settlement Fund does not have standing to pursue claims against either the Dow Corning Settlement Trust or claimants therein. The "Settlement Fund" is a creation of the failed global settlement in which a Qualified Settlement Fund ("QSF") was intended to be formed within the meaning of Section 468B of the Internal Revenue Code of 1986. *See* Exhibit 8 attached hereto at § XI, p. 45. A letter ruling from the I.R.S. approving the Settlement Fund as a QSF, however, was never obtained. Despite this, the concept of a Settlement Fund was carried forward in the RSP Notice ("The fund into which the settling defendants' payments will be made is a continuation of the MDL 926 Settlement Fund established under Order No. 15, with Texas as its domicile, location, and place of creation and administration, and with eligible participants as its beneficiaries.") *See* Exhibit 6 attached hereto, Breast Implant Litigation Notice, *In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926)*, at ¶ 31, p. 13. The "Settlement Fund" is essentially an escrow bank account into

which the RSP defendants periodically deposit funds to pay approved claims and administrative costs, including the fees and expenses of the escrow agent. This is why the MDL Judge who approved the RSP described it as a "claims made settlement." *Id.* at cover page ("a revised 'claims-made' settlement program is being offered ...."); *see also* Exhibit 7 attached hereto, Synopsis of Revised Settlement Program, Key Features, p. 1 ("a 'claims-made' settlement program being offered to domestic breast implant recipients with at least one Bristol, Baxter, or 3M implant (or, under certain conditions, a 'post 8/84 McGhan' implant)).

11. The global settlement provided that the Settlement Fund was to be "established, maintained, invested, and administered by Settlement Class Counsel under the continuing jurisdiction and supervision of the Court."[9] *See* Exhibit 8 attached hereto, Excerpts from the Breast Implant Litigation Settlement Agreement, *In re: Silicone Gel Breast Implants Products Liability Litigation, MDL 926*, at § B2, p. 13. The investment duties of Settlement Class Counsel were delegated by court order to an "Investment Committee" comprised of three individuals: a plaintiffs' representative, a defendant's representative, and the escrow agent, Edgar Gentle. *See* Exhibit 2 attached hereto. The sole function of the escrow agent relates to the investment, custody and oversight of the funds paid into the escrow account. The CAC has reviewed what we believe are all relevant orders in the MDL 926 proceedings concerning the authority of the Settlement Fund and escrow agent, but we could not find a single document or order that empowered the Settlement Fund to take legal action in the manner it has done so before this Court.[10] Likewise, assuming *arguendo* that the Settlement Fund had standing to file the motion,

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[9] The language of the global settlement is applicable since the terms of the global settlement were incorporated into the Revised Settlement Program and apply unless expressly modified by or inconsistent with the terms of the RSP Notice. *See* Exhibit 6 at ¶ 26, p. 11.

[10] For virtually every action he has taken since his appointment in 1994, the escrow agent has been required to obtain unanimous approval of the Investment Committee, the advice and counsel of the Settlement Class Counsel and Signatory Defendants and the approval of the MDL 926 Court – even as to routine matters such as employing an auditor. Surely, if the escrow agent or Settlement Fund had authority to take legal action or file litigation against its

it did not have authority to do so: no record exists that demonstrates that the Investment Committee was consulted or asked to vote to seek authorization to allow the Settlement Fund to take legal action. Moreover, Settlement Class Counsel was not consulted as required by court order, and, in fact, representatives thereof are actively opposing the unilateral and *ultra vires* actions of the escrow agent and Settlement Fund.

12. To the extent there are any aggrieved parties based on a claim of "overpayment," it is the RSP defendants, not the MDL 926 Settlement Fund. Yet the RSP defendants are nowhere complaining about the releases they received from individual claimants or asserting any breach of contract associated with the settlement payments made ten years ago. The MDL 926 Settlement Fund was not formed for the benefit of the RSP defendants and the escrow agent should not take action in a way that threatens and undermines the very neutrality of the MDL 926 Claims Office as he has done here by filing "Proof of Lien" forms and the instant motion.[11] Because the MDL 926 Settlement Fund "lien" claims against the Dow Corning Settlement Facility should not be recognized by this court, if the RSP defendants insist on pursuing the individual claimants in their own respective jurisdictions, they must be prepared to justify the legal basis for voiding the release that claimants signed in the RSP, convince a jury that they are entitled to recover money they paid to a claimant based on arms length dealings and the full disclosure of all known facts by the claimant, and defend the MDL 926 Claims Office against

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former claimants, there would be a written record of the MDL 926 Claims Office, Quality Assurance Committee or court order concerning this. There are none.

[11] The escrow agent and MDL 926 Claims Administrator are working in conjunction on this motion as evidenced by the affidavit supplied by the MDL 926 Claims Administrator in support of the motion and the access he was given to what are confidential claimant files and information. The CAC is unaware of any order that authorizes the escrow agent, the Investment Committee with whom he is supposed to consult, or the RSP defendants to have access to individual claimant files. To the extent an issue of quality control or fraud is raised in the RSP, the MDL 926 Court has appointed a "Quality Assurance Committee" to address such matters. *See* Exhibit 9 attached hereto, Order Regarding The Quality Assurance Advisory Committee, MDL 926, dated May 20, 2004 (appointing Leslie Bryan, plaintiffs' representative, and Richard Eittreim, defendants' representative, to assist Claims Administrator Jean Eliason on Quality Control and fraud issues). The escrow agent is not a member of that committee and should not have been provided access to confidential claimant files.

allegations that it, not the claimants, was negligent and/or careless in the processing of claims in the RSP.

C. Assuming *Arguendo* the Settlement Fund Has Standing, Which the CAC Disputes, the Dow Corning Joint Plan Documents Bar the Relief Sought

13. The relief sought by the Settlement Fund here is defective because no lien can be asserted against the funds that the Dow Corning Settlement Facility administers. Section 10.09 of the SFA expressly preempts efforts to attach or garnish the funds administered by the Settlement Facility, such as now being attempted:

> **10.09** ***No Execution.*** All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, and no Claimant or any other party can execute upon, garnish or attach the Settlement Facility in any manner or compel payment from the Settlement Facility of any Claim. Payment of Claims will be governed solely by the Plan, this Settlement Facility Agreement, the Claims Resolution Procedures, and the Funding Payment Agreement.

SFA at 10.09. In an effort to circumvent this plainly worded provision, the MDL 926 Settlement Fund simply ignores it altogether in its motion. Only after payment is made could the Settlement Fund then seek recovery – presuming it even has standing. Moreover, as will be further explained below, this also presumes that it complies with proper procedures and posts a bond, or obtains a judgment.

14. The terms of the Settlement Facility Agreement elsewhere make plain that the MDL 926 Settlement Fund has no right to interdict the approved settlement payments being made to Settling Claimants. As an initial matter, the Dow Corning Settlement Trust is expressly reserved for Settling Claimants, and there are plainly stated limitations upon any third parties to obtain relief. For example, the Settlement Facility Agreement states that the fund is solely for those identified as Claimants who comprise Settling Personal Injury Claims and all Other Claims not subject to the Litigation Fund:

> **3.02** ***Allocation of Funds.*** The funds received under the terms of the Funding Payment Agreement shall be distributed to Claimants and allocated for administrative and other expenses and costs in accordance with the terms of Articles III, V, and VII herein, the Claims Resolution Procedures, and the Plan.
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> . . .
>
> **(ii)** ***Settlement Fund.*** . . . The Settlement Fund shall be reserved for the resolution of Settling Personal Injury Claims and all Other Claims not subject to the Litigation Fund and all costs and administrative expenses of the Settlement Facility (not including costs and expenses of the Litigation Facility) and shall not be used or accessible for any other reason. Specifically, the Settlement Fund shall be used for payment of the Allow amount of Claims of Settling Claimants in Classes 5-10, 6A, 6B, 6C, 6D and, to the extent provided in the Litigation Facility Agreement, Litigated Shareholder Claims, and for the Allowed amount of obligations described at Section 6.16.5 of the Plan, and for payment of the Allowed amount of Claims in Classes 4A and 11-17 to the extent provided in the Plan and the Litigation Facility Agreement.

SFA at 3.02, (ii). The MDL 926 Settlement Fund is not a "claimant." The Dow Corning Settlement Trust is not a "safety net" by which the MDL 926 Settlement Fund can seek reimbursement for mistaken payments made in its own separate settlement, even if its allegations are true.

15. Under the terms of the Settlement Facility Agreement, only the Settling Claimants have a right to receive distributions with only a limited right given to setoff or withhold some amount on account of specific "derivative" claimants who are set forth in the Joint Plan:[12]

> **5.01** ***Claims Resolution Procedures/Eligibility Guidelines.***
>
> **(a)** . . . Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures shall be paid as specified at Section 7.02. Only those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment . . . .
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> . . .

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[12] It is noteworthy here that the MDL 926 Settlement Fund is not a "creditor" under the Dow Corning Joint Plan. MDL 926 withdrew its disputed claim in the Dow Corning bankruptcy case, and is not otherwise identified in the Joint Plan as a derivative creditor.

> (c) ***Set-Off for Prior Payment.*** The Claims Administrator shall adjust the Allowed amount to deduct the amount of any payments previously made to the Claimant or to the Claimant's physician or other health care provider under the Dow Corning Removal Assistance Program, or any payments in prior partial settlement between Dow Corning and the Claimant not resulting in a general or full release.

SFA 5.01 and 7.02(c). Setoff is an equitable remedy otherwise limited by the Bankruptcy Code, 11 U.S.C. § 553. An otherwise unproven appeal to equity cannot override what the law provides or requires. The MDL 926 Settlement Fund has no basis for any lien or equitable relief here.

D. The Settlement Fund Does Not Have or Articulate Any Other Basis That Supports Its Right to Assert a Lien

16. Texas law does not grant lien rights comprising an enforceable charge on a property right of a Settling Claimant in the absence of (i) entry into consensual lien documents under the Texas Business & Commerce Code providing for the grant of a security interest in a contract right, or general intangible or (ii) imposition of a statutory lien in favor of a creditor party under, for example, the Texas Property Code. *See* TEX. BUS. & COMM CODE ANN, Ch. 9, § 9.101 *et seq.*; TEX. PROP. CODE, § 1.001, *et seq*. There is nothing here to indicate, nor is it alleged, that the Settlement Fund claims any consensual lien in the contract right or general intangible that a Settling Claimant has to recover on her Dow Corning implant related claims from the Settlement Facility. The Settlement Fund nowhere proffers that it has a UCC-1 financing statement on file in each Settling Claimants' home state to perfect, as required by a consensual lien, the alleged "lien." Moreover, it appears self evident from the allegations in the motion that the Settlement Fund is solely relying upon general principles of equity to support attaching an interest in the funds payable from the Settlement Facility to the Settling Claimant. Regardless, the Settlement Fund has no cognizable lien here.

E. The Relief the Settlement Fund Seeks Violates Federal and State Law

17. In the absence of a consensual or statutory lien right, the Settlement Fund is left with only judicial relief on an unsecured claim it purports to have against a breast implant claimant it paid in the RSP, who also happens to have the status of a Settling Claimant under the Dow Corning Joint Plan. As a result, the Settlement Fund's claims for relief when properly viewed are those solely available through issuance of a prejudgment writ in an action initiated against a claimant seeking imposition of some form of unstated injunction, prejudgment garnishment, sequestration or attachment of a Settling Claimant's property rights under applicable state law. What the MDL 926 Settlement Fund is actually seeking from this Court is a form of prejudgment asset freeze on the Settling Claimants distribution from the Dow Corning Settlement Facility. Such relief is only available in extraordinary circumstances not applicable here, and requires specific evidentiary proof (which is clearly missing in the MDL 926 Motion) and posting of a bond.

WHEREFORE, the CAC respectfully prays that this Court deny the relief requested by the Settlement Fund and grant such other and further relief as is just and proper.

Respectfully submitted this 1st day of August, 2007.

FOR THE CLAIMANTS' ADVISORY COMMITTEE

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