UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:	§	
	§	**Case No. 00-CV-00005-DT**
Dow Corning Corporation,	§	**(Settlement Facility Matters)**
	§	
Reorganized Debtor	§	**Hon. Denise Page Hood**
	§	

MOTION TO STRIKE CERTAIN SUBMISSIONS AND ARGUMENTS OF THE CLAIMANTS' ADVISORY COMMITTEE AND PLAINTIFFS' COUNSEL FROM THE RECORD IN CONNECTION WITH THE DISABILITY LEVEL A PROCEEDINGS

Dow Corning Corporation ("Dow Corning") respectfully submits this *Motion to Strike Certain Submissions and Arguments of the Claimants' Advisory Committee and Plaintiffs' Counsel from the Record in Connection with the Disability Level A Proceedings* (the "Motion").

The Claimants' Advisory Committee ("CAC") and various claimants have filed motions challenging the standard applied by the Settlement Facility-Dow Corning Trust ("SF-DCT") in determining whether claims qualify as Disability Level A claims under the Amended Joint Plan of Reorganization (the "Plan"). There is no dispute about the actual standard being applied by the SF-DCT: The SF-DCT is using the current guideline of the MDL 926 Claims Office, which applies the interpretation of the Disability Level A definition (the MDL 926 Claims Office version is identical to the Plan version) issued by the United States District Court supervising the MDL 926 Claims Office in 1997 – two years before the Confirmation Date and nearly seven years before the Effective Date. This is exactly what the Plan authorizes and requires.[1] The CAC and claimants argue, however, that many or, perhaps, most MDL 926 "current claims"[2]

[1] *See* Document Nos. 137, Exhibit 1 at 3-5; 199 at 7-13; 304 at 5-6.

[2] "Current Claims" is a term that defines the claims in the Revised Settlement Program ("RSP") that are eligible for compensation under the Fixed Benefit Option which is where the Disability Level A language is found.

were processed under an older MDL 926 standard put in place before the MDL 926 Court's 1997 Order interpreting the language and contend that the SF-DCT should follow that earlier standard.

All parties seem to agree that MDL 926 guidelines have evolved and changed on several occasions. The parties recognized this and for that reason specified in the Settlement Facility and Fund Distribution Agreement ("SFA") that the Claims Administrator can rely on the guidelines in place as of the date the claim forms were mailed (in 2003) and may, but is not required to, amend those guidelines to conform to interpretations or procedures established by the MDL 926 Claims Office after the Confirmation Date. SFA § 4.03(a). The pleadings filed by the CAC and the claimants ignore these plain directives in the SFA and argue instead that the SF-DCT is required to apply the earliest standard that was allegedly applied by the MDL 926 Claims Office despite the fact that such standard was not accepted by the MDL 926 Court. They argue that the Plan's general guideline that the SF-DCT claims are to be processed in the same manner as the MDL claims were processed means that the claims must be processed using the earliest (and, pursuant to Judge Pointer's Order, erroneous) rather than the latest (and correct) Disability A guideline employed by the MDL 926 Claims Office. As support for this argument they assert that the SF-DCT's Disability A guidelines result in "harsh" treatment of claims.

The flaw in this argument, of course, is that it ignores the language of the SFA and it rejects the binding interpretation of the Disability A guideline set forth in the Order issued by the United States District Court with jurisdiction over the MDL 926 settlement process. The SFA provides that the obligation to apply the guidelines of the MDL 926 Claims Office is qualified by the phrase "except to the extent criteria or processing guidelines are modified by this Settlement Facility Agreement or the Claims Resolution Procedures, or this Section 4.03…." SFA §

4.03(a). As noted, the SFA does in fact direct the Claims Administrator to rely on guidelines in place in 2003 or after the Confirmation Date. Moreover, Dow Corning has made clear in communications to the Claims Administrator (with no objection from the CAC) that the SF-DCT was required to abide by interpretations issued by Judge Pointer. [3]

The plain language of the disease guidelines in the Plan makes clear that a Disability A review includes more than just an analysis of the claimants' vocational disability. Schedule II to Annex A to the SFA states that a "Disability A" claimant must be unable to perform any of her normal activities or only be able to do a very few of them and must provide detailed information about her daily life and limitation to demonstrate that she qualifies. SFA, Annex A Schedule II, Part A at 89. Nowhere does the discussion of the Disability Level A standard state that the claimant need only show evidence related to vocational activities. In fact, the detailed description of the guideline does not even contain the word "vocation." Annex A Schedule II, Part A.[4] The position asserted by the CAC and claimants is thus contrary to the Plan language and turns on difficult factual questions that are irrelevant. Dow Corning's position is that the Court need not and should not consider how the MDL 926 Claims Office processed its claims at

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[3] Dow Corning responded to an inquiry from the Claims Administrator as follows:

> 1. Disease Q1-10 – Question regarding A level disability/severity. Question states that Judge Pointer changed the language of the A level disability category such that the language would read "a functional capacity adequate to consistently perform none or only a few of the usual duties or activities of vocation AND self care" – as opposed to "OR self care."
>
> Response: We do not believe that Judge Pointer issued an order changing the wording of the disability guideline. To the extent that Judge Pointer or the MDL 926 Claims Office has interpreted the meaning of the guideline through annotations or other examples, the Settlement Facility is required to apply those interpretations.

Memorandum from Debby Greenspan to E. Wendy Trachte-Huber re: Pending Questions re: Q and A Booklets dated November 19, 2001, attached hereto as Exhibit A.

[4] Schedule II of Annex A belies the CAC's assertion that claimants never had notice that Disability A required a showing beyond vocational disability.

various points in time. The only relevant inquiry under the Plan is whether the SF-DCT is applying an MDL 926 Claims Office standard that existed in 2003 or after the Confirmation Date. On this central issue, there is no dispute: the SF-DCT is applying the current MDL 926 Claims Office standard. That is all the Plan requires.

Even if these factual questions were relevant, however, they cannot be determined based on the record as it currently exists. These are: (1) what standards were adopted by the MDL 926 Claims Office throughout its history, (2) how were these standards applied in practice, (3) to what claims did these standards apply, and (4) is the SF-DCT's standard "too harsh"? At oral argument, the CAC and claimants attempted to address these questions of fact, and obfuscate the issues, through submission of hearsay documents, misleading excerpts from claim files and their own unsworn statements. In short, they have produced no evidence to support their argument. If these factual questions are found to be relevant to deciding what standard the SF-DCT is to apply under the Plan, which Dow Corning disputes in light of the plain language of the SFA, then the Court cannot proceed on the current record and, indeed, the improper submissions and statements must be stricken. Accordingly, Dow Corning files this Motion.

Procedural History

Eight motions and three "supplements" relating to the Disability Level A standard are currently pending before this Court.[5] On June 20, 2006 this Court held a hearing regarding these Disability Level A motions. The day before oral argument the CAC filed supplemental pleadings containing a memorandum of the Claims Administrator (dated June 9, 2006; hereinafter the "June 9 Memorandum") that was addressed to the CAC and Debtor's

[5] The relevant motions are as follows: Document Nos. 76, 89, 148, 149, 174, 191, 292, 299, 327, 408 and 416.

Representatives and that sets forth a recommendation regarding the Disability Level A standard.

Before the argument Dow Corning filed an objection and response to the CAC's filing of the June 9 Memorandum. *See* Document Nos. 409, 410. Dow Corning argued that this Court had no choice but to disregard the unsworn, informal hearsay memorandum of the Claims Administrator. After the oral argument the CAC filed a "Reply" ("CAC Reply")[6] that includes as exhibits another confidential, informal memorandum of the Claims Administrator and a declaration of the Claims Administrator stating that the June 9 Memorandum is a "business record" of the SF-DCT.

The Debtor's Representatives have contacted the CAC to seek agreement to strike submissions of the CAC but have failed to obtain the CAC's concurrence. *See* Local Rule 7.1(a)(2)(A). Accordingly, by this Motion Dow Corning requests that the Court strike the improper submissions and disregard the comments of counsel that essentially were offered as testimony.

Argument

The Court, of course, cannot determine issues of fact without a proper evidentiary basis. *See Abela v. Martin*, 380 F.3d 915, 930 (6th Cir. 2004) (factfinder "can only consider the evidence that has been properly admitted in the case" and "[e]vidence includes only the sworn testimony of the witnesses" and any admitted exhibits; "[l]awyers' statements and arguments are not evidence."); *Moore v. McKee*, 2006 WL 288070 at *5 (E.D. Mich. 2006) ("the arguments of

[6] *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*, Document No. 416.

counsel are simply not evidence"). To the extent that this Court finds that its decision must turn on factual questions regarding the practices of the MDL 926 Claims Office and SF-DCT, Dow Corning respectfully suggests that the Court cannot proceed on the record as it exists. *See In re Nat'l Rifle Ass'n, v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (in deciding whether an issue is ripe for judicial review, the court must consider "whether the case is fit for judicial resolution . . .which requires a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims."); *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 854-855 (3rd Cir. 1990) (finding that "the detailed factual record requirement, firmly entrenched in our jurisprudence, requires adequate process at the evidentiary stage"; trial court abused its discretion by denying oral argument on evidentiary issues and failing to hold motion in limine hearing and granting summary judgment for defendant since plaintiffs were unable to contest the reasonableness of the data and techniques relied on by the defendants' experts). The June 20 oral argument was neither structured nor intended as an evidentiary hearing and cannot serve as a basis to establish disputed issues of fact. Dow Corning does not believe that a determination of how the MDL 926 Claims Office processed its claims in 1996 or thereafter is relevant in light of the plain language of the Plan. However, if, and only if, this Court concludes that the questions of precisely how the MDL 926 Claims Office processed Disability Level A claims, how its guidelines evolved during its several years of operation and how the SF-DCT's guideline is being applied to claims must be determined in order to decide the Disability Level A dispute (as the CAC and counsel suggest), then the Court must convene a new proceeding.

A. The Submissions and Statements of the Movants Do Not Create A Proper Factual Record.

The CAC and claimants attempted to create a factual record through four types of submissions: (1) they improperly submitted confidential memoranda of the Claims Administrator containing hearsay statements as conclusive proof of the claims-processing practices of the MDL 926 Claims Office; (2) they attempted to offer proof of the actual claims-processing practices of the SF-DCT and the MDL 926 Claims Office through unsworn testimony of counsel without the right of cross examination; (3) they read self-selected excerpts from a handful of claims as "evidence" of the standards employed by the two claims facilities to evaluate the claims and to attempt to demonstrate that the SF-DCT standard is "harsh"; and (4) they improperly filed unsworn letters from the current MDL 926 Claims Administrator.

1. The Claims Administrator's Memoranda Were Submitted in Violation of the Plan and Constitute Hearsay and Are Not Reliable as Evidence.

a. The Memoranda of the Claims Administrator Were Submitted in Violation of the SFA.

The CAC has submitted two memoranda of the Claims Administrator. The first, the June 9 Memorandum filed on June 19, 2006 and again on June 29, 2006, is a portion of a recommendation to the CAC and Debtor's Representatives. The other was submitted as an exhibit to the CAC Reply filed on June 29, 2006 and was a draft memorandum that the Claims Administrator circulated to the parties in August of 2005 for comment and discussion. Both of these documents fall within the scope of the SFA's prohibition on release of documents provided to the CAC or Debtor's Representatives. *See* SFA § 10.10 (requiring the Debtor's

Representatives and the CAC to maintain confidentiality of such documents). These documents have not, to Dow Corning's knowledge, been publicly released by the Claims Administrator.[7]

b. The Memoranda of the Claims Administrator Constitute Unsworn Hearsay and Are Not "Evidence" of the Actual Claims-Processing Practices of the MDL 926 Claims Office.

The memoranda of the Claims Administrator, insofar as they discuss the manner in which claims were actually processed in the MDL, constitute unsworn hearsay and are not and do not purport to be a determination based on actual personal knowledge or analysis of the actual practices of the MDL 926 Claims Office. The August 2005 memorandum was written for the purpose of explaining differences between the RSP and the Plan. The June 9 Memorandum was written to provide a recommendation to the parties regarding Disability Level A claims and was not prepared for or intended to provide a due diligence analysis of the MDL 926 Claims Office. *See* Austern Aff. at 2, attached hereto as Exhibit B.[8] The memoranda thus cannot and do not constitute evidence that can be accepted by this Court for the purpose for which they are

[7] The CAC asserts in the CAC Reply that Dow Corning "failed to inform the Court" that the Claims Administrator's June 9 Memorandum was not available for public dissemination until the day the Supplement Exhibit was filed. *See* CAC Reply at 2. At no time, to Dow Corning's knowledge, did the Claims Administrator ever release these documents publicly or indicate that he was prepared to circulate them publicly. (Although Dow Corning was copied on a June 9, 2006 letter from Leslie Bryan (not a CAC member) to the Finance Committee seeking release of the memorandum, it has *never* received any response from the Finance Committee, either orally or in writing, providing authorization for the dissemination of the memorandum.)

[8] As set forth in the letter of the Claims Administrator clarifying his memorandum, the statements in the memorandum do not represent a statistically significant sample or random sample of MDL claims and are based in large part on the oral unsworn accounts of former MDL claims reviewers (who were not authorized to render final decisions) recounting their recollection of ten-year-old events. *See* Dow Corning's *Response to 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-Dow Corning Trust and Request for Expedited Consideration* ("Response to Supplemental Exhibit") (Document No. 410) at Exhibit 1. (The Movants acknowledged at oral argument that the Claims Administrator's review was "not a statistical sample of claims." Tr. at 6-7.)

proffered.[9] *See* Fed. R. Evid. 801, 802.

The CAC's argument that the Claims Administrator's memoranda are admissible under the business records exception to the hearsay rule is without merit. *See* CAC Reply at 11. The business records exception requires that documents be prepared in the normal course of business and that the document was made at or near the time of the event it records. *See* Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.08[1] (Joseph M. McLaughlin ed., 2d ed. 2006); *see also U.S. v. Weinstock*, 153 F.3d 272, 276 (6th Cir. 1998) (to qualify for the business records exception, a document must have been prepared in the ordinary course of business). In this case, the Claims Administrator's informal analysis was based on his own view that it might be helpful to resolve the pending disputes among the parties, without any assignment from the parties to do so. *See* Austern Aff. at 2. On its face, the June 9 Memorandum states that it was prepared in connection with ongoing litigation. *See* June 9 Memorandum at 1; *see also* Austern Aff. at 1-2. Records prepared for use in litigation are generally not admissible under the business records exception because such materials are not prepared in the regular course of business or because such materials demonstrate a lack of

[9] The CAC's allegation that the clarifying statements raised by Dow Corning in its Response to the Supplemental Exhibit regarding the nature and scope of the Claims Administrator's memorandum are "without merit" omits one critically important detail: the fact that the Claims Administrator *himself* confirmed each and every one of these clarifications. Moreover, the CAC's argument that a number of the annotations in place at the SF-DCT were "based on the nurse[s]'s memories and experience at the MDL 926 Claims Office" and therefore must be considered as "similarly suspect" if in fact Mr. Austern's memorandum cannot constitute evidence in a court of law is an incomplete and misleading characterization of the basis of these annotations. *See* CAC Reply at 9. Unlike the Claims Administrator's review, which was based *almost exclusively* on the oral histories obtained through conversations with former MDL claims reviewers who relayed their recollection of events that occurred 10 years ago, the annotations were based on a *combination* of "boxes" of written documents and disks, including "letters, memoranda, and annotations" as well as interviews of former MDL staff. *See* CAC Reply, Exhibit 21 at 13. Moreover, the guidelines were reviewed and confirmed by the current MDL Claims Administrator.

trustworthiness. *See* Weinstein & Berger at § 8.03.08[6][d]. Accordingly, the memoranda cannot qualify as business records for the purposes of avoiding the established rules of hearsay.

Moreover, the memoranda are not admissible under the business records exception because they were not made at or near the time of the events that they purport to record. *See* Weinstein & Berger at § 803.08[5]; *see also U.S. v. Lemire*, 720 F.2d 1327, 1350 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (finding inadmissible memoranda prepared one year and ten months after the events it described). Rather, the memoranda are based on hearsay statements made by individuals formerly employed at the MDL 926 Claims Office with respect to their own recollections of RSP proceedings. *See* Austern Aff. at 3 (noting that report reflected oral histories and recollections and is obviously not the "best evidence of the Claims Office practices and guidelines"). These statements relate to events that happened ten years ago and were therefore not contemporaneously recorded as the exception requires. Indeed, the memoranda reflect classic "hearsay within hearsay" such that even assuming that the memoranda themselves could qualify as a business records, the underlying statements are inadmissible unless the statements of the reporting individuals independently qualify as nonhearsay or are admissible under a hearsay exception. *See U.S. v. Payne*, 437 F.3d 540, 547 (6th Cir.), *cert. denied*, 126 S.Ct. 2909 (2006); Fed. R. Evid. 805. The Movants provide no proof that these statements fall within either of these carve-outs. The hearsay rule does not allow oral recollections of long past events provided to a third party in connection with litigation to qualify as admissible statements.

A contrary result would implicate all the reliability and trustworthiness concerns to which the hearsay rule speaks.[10] For these reasons, the business records exception simply does not apply.

2. The Unsworn Statements of Movants' Counsel Do Not Constitute Proper "Testimony" and Cannot Be Considered by This Court.

The "testimony" of lawyers at oral argument regarding the claims-processing practices of the MDL and the SF-DCT must be disregarded to the extent offered as evidence of the claims-processing practices and results of the MDL 926 Claims Office and the SF-DCT. *See Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006) (trial court instructed jury that "counsel's arguments were not evidence" and thus defendant's due process rights were not denied). *See also Abela v. Martin*, 380 F.3d 915, 930 (6th Cir. 2004); *Moore v. McKee*, 2006 WL 288070 at *5 (E.D. Mich. 2006). This principle is self-evident.

A simple example illustrates the impropriety of reliance on this "testimony" of counsel. Plaintiffs' counsel cited claims from several pending motions as proof that "claimants were paid a disability level [A] in [the] MDL based on vocational disability only." Transcript at 7, attached hereto as Exhibit C. With respect to the Bryan Motion, counsel pointed to a self-selected sample of 33 claims (13 MDL 926 Claims Office claims and 20 SF-DCT claims) and argued that the fact that the 13 claims submitted to the MDL 926 Claims Office were approved at Disability Level A

[10] Likewise, the business record exception requires the "testimony of the custodian or other qualified witness" and expressly excludes any records where "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6). Both the source of information (*i.e.*, the oral histories of former MDL claim reviewers) and the circumstances of preparation (*i.e.*, lack of a statistically significant sample of MDL claims or a random sample of MDL claims) undermine the reliability of the memorandum. Accordingly, the business records exception does not apply. *See, e.g., U.S. v. Brika*, 416 F.3d 514, 528-29 (6th Cir. 2005) (affirming decision of trial court precluding admission of document purported to be a business record under Rule 803(6) for lack of foundation where the author did not testify and therefore the party seeking to introduce the document failed to establish its reliability); *U.S. v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001), *cert. denied*, 534 U.S. 1151 (2002) (finding district court erred in admitting purported records under Rule 803(6) where extent of testifying witness's familiarity with recordkeeping system was a few conversations with the author of the records).

and the 20 claims submitted to the SF-DCT were found deficient is conclusive proof that the two facilities applied different standards. *See* Tr. at 14-15. The "fatal flaws" in this assertion are obvious: there is no indication that these claims were selected randomly from the entire pool of MDL and SF-DCT claims, there was no effort to discover or disclose the complete files and no effort to ascertain the reason for the approvals and denials.

The SF-DCT's actual review of the claims – as opposed to counsel's selected excerpts from selected documents – demonstrates that the majority of claims cited in the example were found deficient for reasons unrelated to the interpretation of the Disability Level A standard – information that can be verified through affidavits and live testimony, if necessary. For example, Mr. Austern's Affidavit demonstrates that a number of claims were deemed deficient because the medical records contradicted the disability level, for lack of specificity in identifying the nature of the disability, for lack of causal connection between the claimed ACTD symptoms or death and the disability or for lack of adequate documentation regarding the claimants' disabilities with respect to vocation and self-care, a designation that Dow Corning understands can relate to a variety of deficiencies, including lack of support or contradictory medical records. *See* Austern Aff. at 4-5. Additionally, several claims had been assigned a Level B or Level C disability level by the claimant's own physician or had been approved and paid at the disability level requested. *See id.* at 5. Thus, the "testimony" of claimants' counsel is both inherently improper and demonstrably wrong.

3. The Movants' Use of Non-Random, Self-Selected Claims to "Prove" Processing Practices and Allegations of "Harshness" is Misleading and Improper.

In pleadings and at oral argument, the CAC and claimants presented self-selected examples of excerpts from claims – often quoting conclusory language from Qualified Medical Doctor ("QMD") letters – as "evidence" of the practices regarding Disability Level A claims in the MDL and the SF-DCT. These examples were cited not only as evidence that different standards were applied but also to demonstrate the alleged "harsh" effect of the SF-DCT claims processing operation. The use of these selected excerpts from a few claims is inherently misleading and unreliable, and thus, to the extent this testimony under the guise of argument is offered as evidence, it must be disregarded.[11]

The requirements for a Disability Level A claim are extensive and outlined in some detail in the Plan.[12] All of the guidelines were taken directly from the MDL 926 Claims Office guidelines. The Plan explicitly states that to qualify a claimant must:

- be unable to do any of her normal activities or only be able to do a very few of them (Annex A Schedule II, Part A);
- provide sufficient evidence of her daily life and limitations to allow the reviewer to know that she meets the strict definition (*id.*);
- submit evidence that she has a qualifying symptom that caused the disability (Annex A § 7.06(d)4.);
- submit evidence that the disability is consistent with information in the claimant's documents and the Disease Criteria (Annex A § 7.06(d)5.);

[11] Again, this is self-evident: first, isolated claims simply do not establish the practices or guidelines applied to thousands of claims; second, the claims evaluation process requires an extensive review of the entire claim file and assessment of contradictory documents and medical records and thus a comparison of excerpts from QMD letters which comprise a small part of the file is meaningless; and third, neither Dow Corning nor the CAC and claimants have the knowledge or basis to determine why particular claims were approved or disapproved in the MDL or in the SF-DCT.

[12] Exhibit D to this Motion contains examples of some of the applicable guidelines to illustrate the requirements to qualify and the complexity of the review.

- submit all records upon which the QMD relied (Annex A § 7.06(d)2.); and
- demonstrate that the disability is current (Annex A § 7.06(d)7.).

Most importantly, the language of the Plan – copied verbatim from the MDL 926 Claims Office guidelines – makes clear that mere statements in a QMD letter do not suffice to qualify a claim. The claimant must submit a disability statement that provides support for the determination of the QMD or treating physician. Conclusory statements, such as those quoted by the CAC and claimants at oral argument, do not suffice. Thus, the CAC's and claimants' reliance on the conclusory language in QMD letters as "evidence" of MDL or SF-DCT practices is neither probative nor reliable.

The lack of reliability of the examples cited by Movants is vividly illustrated by examining two claims that counsel relied upon at oral argument. Counsel cited two particular claims as proof of the differing practices of the SF-DCT and the MDL, arguing that the claims "illustrate[] the problem that claimants are having with regard to a criteria and a guideline that their MDL counterparts did not have[:] vocation and self-care." Tr. at 23-24. Counsel read excerpts from QMD letters and Notification of Status letters as purportedly definitive proof of the alleged difference in standards in the two facilities. Counsel conveniently ignored (and failed to provide) any of the medical records from the claimants' files.

Because the Debtor's Representatives had no notice of or access to the documents relied upon by counsel, the Debtor's Representatives asked the SF-DCT after the oral argument to explain the circumstances of these claims. Mr. Austern and his staff reported that Claim A (discussed at Tr. 22-24) was denied because the supporting medical records contradicted the QMD letter. That is, the deficiency notice for that claim had nothing to do with the application

of any Disability Level A criteria or the issue of vocation versus self care. After the claimant submitted additional information in response to the deficiency notice, the claim should have been approved under the guidelines but, unfortunately, was denied again, in error. The Claims Administrator advises that the reviewer who looked at the supplemental submission simply made a mistake – one that was corrected in the error correction process. Ultimately, this claim was approved and paid as Disability Level A. *See* Austern Aff. at 6.

The second claim cited by Movants, identified herein as Claim B (and discussed at Tr. 24-25) was also denied because the QMD letter was not sufficiently specific and did not link the underlying medical conditions to the disability. The Notification of Status letter sent to the claimant requested "clarification" regarding some of the claimant's self-care limitations since there were "discrepancies" between the QMD letter and the back-up medical documentation. *See* Tr. at 25; CAC Reply at Exhibit 25. Upon re-review, the SF-DCT staff concluded that they could infer the linkage between the symptoms and disability by combining certain medical records with the QMD letter and approved the claim as a Level A claim.[13] *See* Austern Aff. at 5-6.

The language of the QMD letters offered by the CAC and claimants as proof of the manner in which claims were processed at the MDL and of the "harshness" of the guidelines of the SF-DCT thus does not constitute evidence on which this Court can rely.[14]

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[13] The Claims Administrator reports that this claim was sent to the MDL for review and that the MDL concluded that the claim could not be approved as a Disability Level A and could only be approved as a Disability Level B claim. Austern Aff. at 5.

[14] At oral argument the CAC representative indicated that these two claims had been denied by the SF-DCT. The obvious, and misleading, implication again was that the SF-DCT guidelines were entirely too harsh and unjust. In its Reply, in an effort to "cure" this misleading omission, the CAC acknowledged that both claims were approved on appeal. *See* CAC Reply at 17-18. Nevertheless, counsel's failure to explain the situation fully at oral argument undermines the integrity of these proceedings. This underscores the point of this Motion – i.e., that the reiteration or

Had a proper evidentiary hearing been held, the Court would have heard testimony regarding the various reasons for approval and denial of claims and that the issue of the requirement of vocation versus self care is not the source of significant differences in percentages of approval rates between the MDL and the SF-DCT. For example, the SF-DCT sent a sample of 59 claims to the MDL for comparison. In 44 (or 75%) of the claims, the MDL arrived at the *same* conclusion as the SF-DCT. Of the remaining 15 claims, the MDL determined that a lower disability level should have been awarded in 8 of the claims and a higher disability level should have been awarded in 7 of the claims. *See* Austern Aff. at 4. These statistics hardly demonstrate that the SF-DCT is more stringent in its claims review.

Another example of the misleading "testimony" of counsel is the assertion made to the Court regarding the deficiency letters issued by the MDL 926 Claims Office. In an effort to convince this Court that the SF-DCT is overly harsh in its review of claims, the CAC asserted (in response to a question from the Court) that the MDL 926 Claims Office rarely issued deficiency notices. *See* Tr. at 82 ("The deficiency letters [in the MDL] were few and far between.") A proper evidentiary record would show that, like the SF-DCT, the MDL 926 Claims Office found a large percentage of its own claims to be deficient, contrary to the statements of the CAC. The MDL 926 Claims Office's own statistics show that in early 2004 the MDL 926 Claims Office had over 11,000 pending disease deficiency notices out of 39,000 claims. This is a 29.4% deficiency rate. In comparison, the SF-DCT reports a similar 30.57% deficiency rate for disease claims. *See* SF-DCT Claims Processing Report for the Period Ending June 30, 2006 at 2,

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review of portions of individual claim files without proper testimony is misleading and cannot be used to establish any issues of fact.

attached hereto as Exhibit E(1) and MDL-926 Settlement Fund Management Report dated March 3, 2005 at 5, attached to the Affidavit of Deborah E. Greenspan, attached hereto as Exhibit E(2).

4. The Letters of the MDL Claims Administrator are Unsworn and Unreliable and Must Be Disregarded.

The letters of the MDL Claims Administrator purporting to explain the differences in the treatment of the claims by the MDL and the SF-DCT similarly constitute unsworn hearsay and cannot be considered by this Court.[15]

The MDL Claims Administrator's statements are directed to Judge Clemon and are simply assertions that appear to be based on a review of a motion filed in the MDL court. The statements are unsworn, the MDL Claims Administrator was not subject to cross-examination by Dow Corning to determine the trustworthiness of those statements and these statements contradict the determination by the MDL Claims Administrator that the SF-DCT guidelines in fact are consistent with those of the MDL Claims Office. The MDL Claims Administrator's conclusory statements, based solely on advocacy pieces,[16] do not constitute "proof" of any claims-processing practices and cannot be considered by this Court.

B. Judge Pointer's Order Was Public and Unambiguous Regarding the Practice of the MDL Claims Office Requiring Claimants to Prove Disability With Respect to *Both* Vocation and Self-Care.

In its Reply the CAC urges this Court to disregard Judge Pointer's September 30, 1997 Order, asserting "[e]ither the appeal had nothing to do with the and/or issue" or Judge Pointer "made a mistake" when he declared that the MDL Claims Office had been consistently

[15] Dow Corning was not provided with copies of these letters at oral argument.

[16] The MDL Claims Administrator's review was based solely on a review of the "materials submitted to [the MDL Court] and the parallel motion submitted to [this Court]". *See* CAC Reply, Exhibit 16.

processing Disability Level A claims using the "vocation and self-care" standard. The CAC cites the Claims Administrator's memorandum as conclusive and "undeniable" proof of its assertion. *See* CAC Reply at 12, 15. This argument turns common sense on its head: the CAC suggests that this Court should rely on the hearsay statements of the SF-DCT Claims Administrator, who admittedly has no personal knowledge of MDL 926 practices, over the plain statements of the Judge who supervised the MDL 926 Claims Office, which were made at the relevant time period. Judge Pointer's Order explicitly states that the MDL Claims Office consistently awarded Disability Level A compensation only where a claimant had both vocational *and* self-care functional incapacity. The cavalier suggestion that Judge Pointer – who for years served as the presiding judge in the MDL, supervised the Claims Office and was intimately involved in every aspect of those proceedings – would have made such a "mistake" is baseless.

It is also important to keep in mind that Judge Pointer's Order simply adopts the correct grammatical interpretation of the Disability Level A definition.[17] The Disability Level A guideline states that to qualify the claimant must be able to perform "none or only a few of the usual duties or activities of vocation or self care." A simple example illustrates the correct reading of this sentence: If one breaks a leg and receives the instruction "Do not perform your usual activities of running or jumping," one would not interpret the instruction to mean that the doctor suggests the patient could elect to run or to jump but could not do both. In fact, the instruction prohibits both. Similarly, the Disability Level A standard covers both vocation and

[17] Dow Corning incorporates, without reiterating, the arguments made at length in its prior pleadings regarding the public nature of Judge Pointer's Order. *See, e.g.*, Document Nos. 161 at 16-17; 137, Exhibit 1 at 4; Exhibit A at 2, 10-11.

self care. This is the plain and common sense reading of the standard. The CAC asks this Court to rely on inadmissible documents and unsworn self-serving statements of counsel as evidence sufficient to override the plain language of the Plan and the binding determination of United States District Judge Pointer.

Conclusion

The plain language of the Plan requires that the various motions be denied and dismissed. The SF-DCT is following its mandate. Dow Corning respectfully requests that the improper submissions and statements be stricken from the record. If the Court determines that it is necessary to examine the evolution of the MDL 926 Claims Office guidelines and its practical application as compared to SF-DCT guidelines, then the record as it exists is insufficient and improper. If and only if the Court determines that such a factual inquiry is necessary then the Court must hold a proper evidentiary hearing.

Respectfully submitted this 14th day of September 2006.

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