UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Reorganized Debtor.

Case No. 00-CV-00005-DT
(Settlement Facility Matters)

The Honorable Denise Page Hood

_____/

DOW CORNING CORPORATION AND THE DEBTOR'S REPRESENTATIVES' RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DECLARATORY RELIEF REGARDING RELEASES

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Dow Corning Corporation ("Dow Corning") and the Debtor's Representatives respectfully submit this Response to the *Motion of Claimants' Advisory Committee for Declaratory Relief that the "Receipt and Release" Document Solicited by the Dow Corning Legal Department from Unrepresented Claimants from 1992-1995 as Part of the Removal Assistance Program (or Represented as Part of Such Program) Is Not a General Release* (the "Motion") [Dkt. No. 332, filed Mar. 16, 2006].

INTRODUCTION

The Claimants' Advisory Committee's ("CAC") Motion suffers from major legal and factual deficiencies that will be discussed in greater detail below. However, as a threshold matter, the Court need not even reach the merits of the CAC's Motion because there is a resolution that is simple, easy to implement, and fair to the individual claimants and Dow Corning. Consequently, before delving into the fatal procedural and substantive flaws underlying the CAC's Motion, Dow Corning and the Debtor's Representatives present the following alternative option to the Court.

I. THE DECEMBER 2004 STIPULATION PROVIDES A STRAIGHTFORWARD AND FAIR RESOLUTION

In December 2004, the Debtor's Representatives and the CAC stipulated to a dispute resolution procedure for resolving disagreements over whether a prior release or prior dismissal or judgment barred a claimant's claim. (Dec. 23, 2004 Stip. & Order for Res. of Disputes re Release of Claims, Dkt. No. 78, CAC Mem. Ex. 1) While Dow Corning was amenable to the stipulation covering all individual claimants, ***at the CAC's insistence***, certain claimants were carved out. The CAC specifically excluded the very claimants who are now the subject of its Motion, *i.e.*, unrepresented claimants who signed a release in exchange for a payment of less

than $15,000 between 1992 and May 15, 1995 and those claimants who alleged that they signed a release as part of the Removal Assistance Program ("RAP"). (*Id.*, Ex. A at ¶ 1)

The stipulation established reasonable and evenhanded procedures for individual claimants to challenge their exclusion from the Settlement Fund. A Claims Administrator conducts a first-level review of released claims. (*Id.*, Ex. A at ¶ 7) If there is "clear written documentation" that the claimant meets certain criteria for eligibility (*e.g.*, "the person identified in the release . . . is not the same person as the Claimant"), then the Claims Administrator can approve the claimant for participation in the Settlement Fund. Otherwise, the Claims Administrator must notify the claimant that she has the option to appeal the determination that she is ineligible.

The claimant then may elect to proceed through the Appeals Judge Review Process. (*Id.*, Ex. A at ¶ 10) To initiate a review, the claimant "must submit a letter to the Settlement Facility outlining in detail the reasons why the release is inapplicable and/or why the Claimant should be determined to be eligible to participate in the Plan," along with any applicable supporting documentation. Dow Corning may, but is not required to, submit a response; the claimant subsequently can submit a letter of reply. After receiving these materials and conducting a conference or telephonic hearing if deemed necessary, the Appeals Judge must issue within 45 days a written ruling determining the claimant's eligibility.

Either Dow Corning or the claimant can appeal the Appeals Judge's ruling to this Court. (*Id.*, Ex. A at ¶ 10(g)). The Court conducts a *de novo* review to determine the claimant's eligibility to participate in the Settlement Fund.

The agreed procedures thus provide a fair and straightforward mechanism through which individual claimants can challenge any determination that previously signed releases bar them

from receiving compensation for their claims. Each claimant's situation is reviewed on an individual basis and the claimant, if unhappy with the resolution of her claim, can still have her day in court (and in this Court in particular) by pursuing the appeals process.

Dow Corning was amenable in December 2004 to having the claimants who are the subject of this Motion participate in these agreed procedures. The company remains agreeable to their inclusion in the process today.

II. THE COURT SHOULD DENY THE CAC'S MOTION

If the CAC insists on proceeding with motion practice despite the availability of these agreed procedures and despite the fact that it is unclear whether the CAC even contacted the claimants at issue in this Motion to determine whether they wanted to be bound by the Court's determination, then its Motion should be denied. The Motion suffers two major flaws. *First*, the CAC misstates the facts about the purpose, scope, and activities of Dow Corning's voluntary, and entirely legitimate, "Removal Assistance Program". *Second*, the Motion has multiple, fatal legal deficiencies. It improperly seeks a declaratory judgment via motion practice, instead of filing a complaint as required by the Declaratory Judgment Act, the Federal Rules of Civil Procedure, and the Federal Rules of Bankruptcy Procedure. And it improperly seeks global relief without any showing that such relief is justified here, in violation of both the Plan and the Federal Rules.

A. Overview of Factual Mischaracterizations

The CAC attempts to vilify the Removal Assistance Program by characterizing it as a bait-and-"switch" operation designed to "lure" "desperate" and "vulnerable" women into the RAP and then "steer" them into another program that required signed releases in exchange for monetary compensation or reimbursement. However, as detailed below, the evidence -- including documentation affixed to the CAC's own Motion -- refutes this mischaracterization.

The facts show that, in 1992, the media focused attention on new (and scientifically unsupported) allegations of an association between silicone gel breast implants and autoimmune disease. The media frenzy caused fear and uncertainty among breast implant recipients, and Dow Corning and physicians were inundated with questions from worried, upset patients. Although not legally required to do anything, Dow Corning voluntarily embarked on several efforts to ameliorate concerns among breast implant patients, including instituting a new program, known as the "Removal Assistance Program" or "RAP." Dow Corning implemented the RAP to provide financial support to women who, in agreement with their physicians, decided to have their implants removed but could not afford the full cost of explant surgery. The RAP paid up to $1,200 to help defray the uninsured costs of explant surgery.

The key word is "Assistance." Dow Corning did not represent that the $1,200 would cover all explant surgery costs for all physicians, some of whom charged more than $1,200 (although generally not as much as the exaggerated $20,000 mentioned without citation in the Motion[1]). The voluntary $1,200 payment nevertheless provided a helping hand -- Assistance -- to women at a time of need. About 5,000 women, dwarfing the six claimants picked by the CAC in its Motion by almost a thousand fold, accepted Dow Corning's offer of up to $1,200 assistance and used the money to pay for all or part of their explant costs. Dow Corning provided approximately $6 million to assist in paying uninsured costs related to removal surgery through the RAP, and it was money well-spent. Contrary to the CAC's insinuations, there were no

[1] The statements of the CAC's hand-picked claimants establish that the true cost of explant surgery during this time period was nowhere near $20,000. They state that their surgery costs ranged from $2,431.95 (Diaz Stmt. ¶ 8) to $12,979.29 (Boyette Stmt. ¶ 14). Most of their explant surgeries were at the low end of this range. (*See* Schmidt Stmt. ¶ 4 (cost of surgery was about $5,200); Jamison Stmt. ¶ 7 ($4,450); Ai Stmt. ¶ 11 ($3,165.19); Wappel Stmt. ¶ 4 ($7,526)).

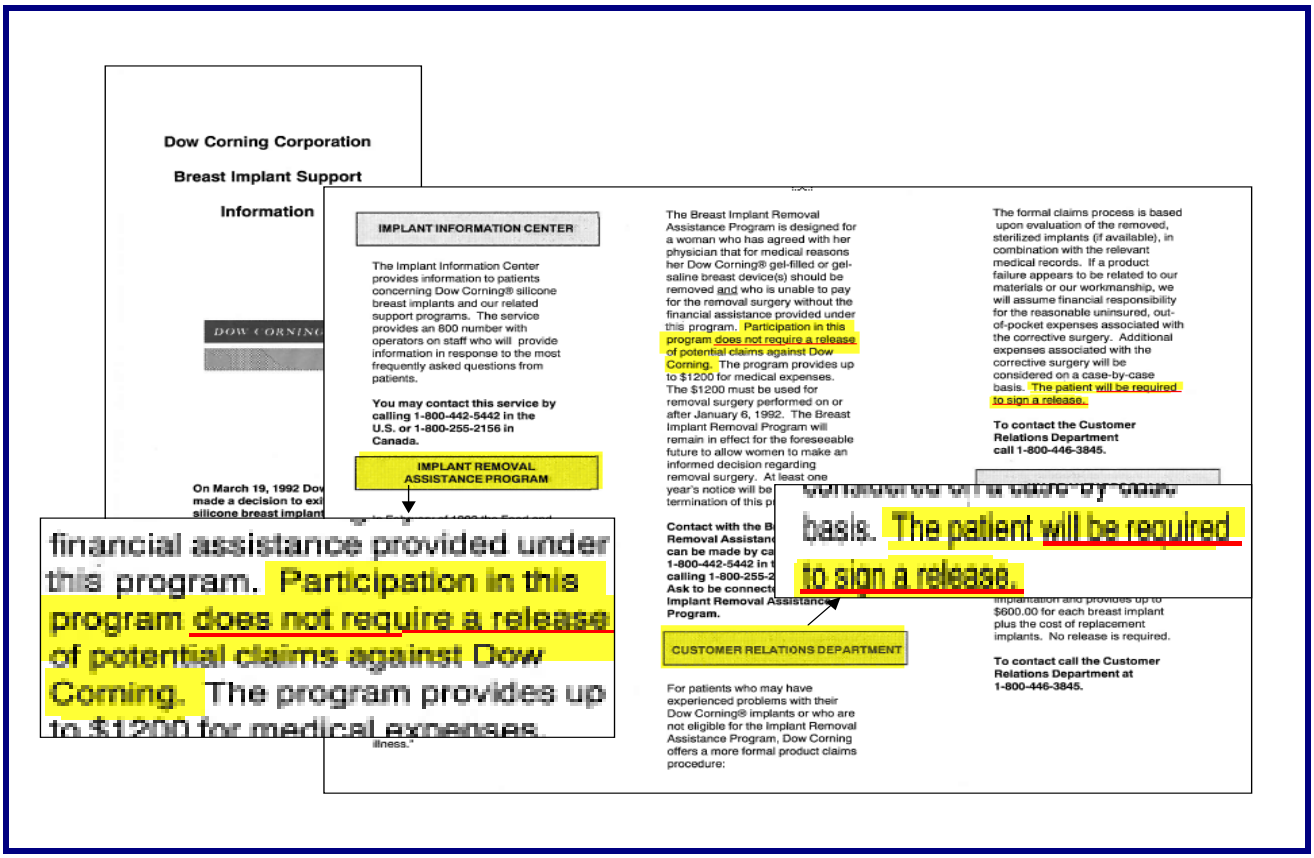
strings attached to the $1,200 RAP payment. Women were ***not*** required to sign a release in exchange for RAP financial assistance.

In its Motion, the CAC distorts the facts by misleadingly quoting selective portions of a few documents hand-picked from among the thousands of pages produced by Dow Corning regarding the RAP. In particular, the CAC deliberately seeks to blur the distinction between financial assistance offered through the RAP and settlement payments made pursuant to an entirely different claims resolution program in which claims were consensually resolved by payment of a negotiated sum in exchange for a release. Dow Corning's claim resolution program was in existence for years before the breast implant controversy erupted and the voluntary Removal Assistance Program was created in early 1992. Of course, the claims resolution program continued as the controversy mushroomed in 1992. It was used to resolve claims on a mutually agreeable basis in two principal situations: (1) claimants who did not qualify for RAP, for example because their implants had been removed earlier (and therefore there was no need for explant assistance); (2) claimants who wanted more than $1200 and were willing to sign a release in exchange for additional money.

Dow Corning is proud of both of these programs. As shown by the affidavits and documents cited below, properly trained Customer Relations Specialists, many of whom were paralegals, handled settlement of claims exceeding $1,200 or that could not qualify for RAP payment. This was a lawful and perfectly appropriate corporate activity, and the CAC's smearing of the Customer Relations Specialists, one of whom has provided an affidavit attached hereto, is unjustified. As also shown by the evidence cited below, the parallel RAP program was a different and similarly appropriate activity.

The CAC's innuendo notwithstanding, the facts and the evidence below show that there was no "deception." It was neither a secret nor "private" that a release was required to settle a claim. Instead, as established below by affidavits and contemporaneous documents, Dow Corning gave women two openly disclosed options, and women were free to accept either, both, or neither: (1) no-strings-attached $1,200 RAP payment to assist with the costs of surgery; or (2) higher, negotiated amounts, which claimants had the choice to apply toward their explant surgery or to use in whatever other way they wished, in exchange for a release.

For example, as reproduced below, a 1992 Dow Corning Breast Implant Support Information brochure clearly disclosed that, while "[p]articipation in [the Removal Assistance] program ***does not require a release*** of potential claims against Dow Corning," patients receiving monies through the "more formal product claims procedure" offered by the Customer Relations Department "***will be required to sign a release***." (1992 Dow Corning Breast Implant Support Information brochure, Affidavit of Bridget Snow-Swantek, attached hereto as Ex. 1 ("Snow-Swantek Aff."), Ex. E (emph. added))



The CAC's submission of statements from six hand-picked claimants further highlights the inaccuracies that permeate its Motion. For instance, the CAC suggests that Bonnie Boyette was tricked into executing her release. However, contemporaneous documents reveal just the opposite: Ms. Boyette knowingly executed her release and "had no problem [with] signing a release." These documents show that Dow Corning's Customer Relations Specialists acted responsibly to ensure that claimants, like Ms. Boyette, who settled their claims outside of the RAP, executed releases knowingly and voluntarily after full disclosure by Dow Corning.

B. Overview of Legal Deficiencies

The CAC's "Motion" has four fatal legal deficiencies. At the outset, the "Motion" should be stricken because it fails to meet the most basic pleading requirements for declaratory judgment actions. In particular, the Federal Rules of Bankruptcy Procedure and incorporated

Federal Rules of Civil Procedure require that a request for declaratory relief be initiated by filing a complaint, not a motion. The CAC's failure to even reference, let alone provide any support for, its burden of showing compliance with the standing and jurisdictional requirements for declaratory judgment actions also merits dismissal of the Motion.

Second, the CAC has provided no basis for granting extraordinary blanket relief to all claimants, as opposed to individual relief pursuant to motion practice brought on behalf of particular claimants. The CAC's attempt to employ the declaratory judgment device to achieve blanket relief, which potentially implicates the rights of multiple parties not present, ignores the due process implications of and prerequisites for seeking aggregate relief. The CAC's failure to offer any basis upon which to institute this "global" remedy merits dismissal.

Third, by asking the Court to declare generally that certain "Release and Receipt" documents executed by breast implant claimants are not general releases and "d[o] not bar claimants from participating in the Settlement Option,"[2] the CAC impermissibly seeks to rewrite terms of the Plan by creating a procedural mechanism not found within the four corners of, and not contemplated at the time of voting or confirmation of, the Plan. This violates the Plan's specific, limited procedures for amending or modifying the Plan. This violation is particularly troubling where, as here, the requested relief threatens to allow unidentified and unquantified numbers of otherwise ineligible claimants to seek reimbursement from the finite resources of the Settlement Fund. The relief sought may be pursued either by individual actions or by a negotiated overall resolution; neither should implicate issues of improperly rewriting the Plan.

Finally, even if the Court were to take up the merits of the claims presented here, the facts and law applicable to the six claims do not justify invalidating the release. As explained in

[2] Mem. in Supp. of CAC Mot. for Declaratory Relief [Dkt. No. 333] ("CAC Mem.") at 33.

prior briefing on this very issue in the context of Litigation Facility motions challenging previously-released claims,[3] the Court need not and should not look beyond the unambiguous language of the release documents to determine their scope. And, even if the Court were to consider the extraneous and unsubstantiated parol evidence in the CAC's Motion, the CAC still fails to show the requisite legal nexus between its purported "facts" and its requested relief.

FACTS

I. DOW CORNING'S REMOVAL ASSISTANCE PROGRAM WAS FAIR, OPEN AND HONEST.

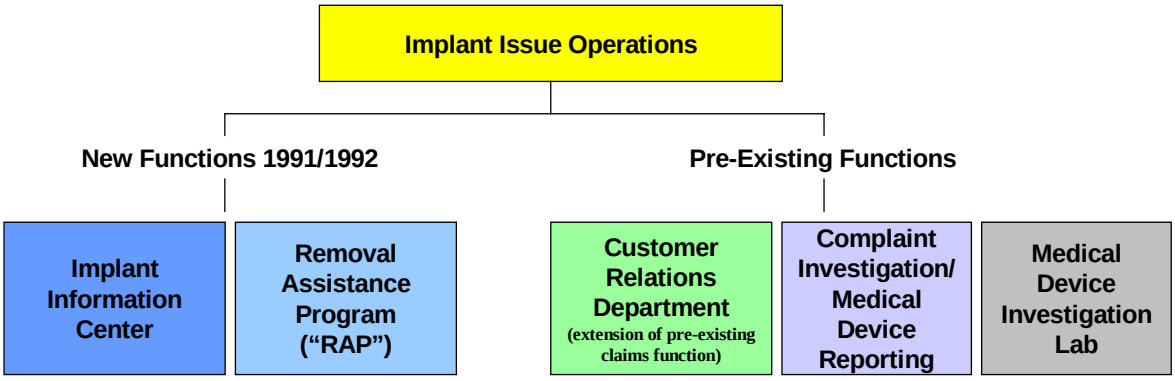
A. The Removal Assistance Program Constituted One Component Of Dow Corning's Implant Issue Operations.

In the early 1990s, Dow Corning and other silicone breast implant manufacturers found themselves swept up in a sudden, explosive controversy stemming from anecdotal but nonetheless alarming reports of autoimmune disease claimed to be associated with implants. Although the reports have since been discredited by dozens of scientific studies and the consensus of leading, impartial medical authorities and government agencies around the world, at the time they were sensationalized by the news media, creating widespread fear among breast implant patients. A spate of unprecedented litigation soon followed. The lawsuits fueled more media coverage, which in turn fueled the filing of more lawsuits, all of which -- regardless of one's view of the merits of the litigation -- caused great fear and anxiety among many women with breast implants.

Although Dow Corning believed breast implants were safe, the company recognized the real fears faced by implant recipients during this crisis; it could hardly have done otherwise since

[3] *See* LF Mot. & Mem. In Supp. of Mot. for Summ. Jdgmt. of Previously Settled Claims, 00-CV-00001 [Dkt. No. 71]; LF Reply Br. in Supp. of Mot. for Summ. Jdgmt. of Previously Settled Claims, 00-CV-00001 [Dkt. No. 91], both of which are incorporated by reference as if fully restated herein and which are attached hereto as Exs. 2, 3.

its phone lines were ringing off the hook as the controversy escalated. Dow Corning responded with a multi-pronged approach managed by the "Implant Issue Operations" group. (*See* Affidavit of Peggy Gerstacker, attached hereto as Ex. 4 ("Gerstacker Aff."), ¶¶ 2-3; *see also* exemplar Organization Chart, Gerstacker Aff. Ex. A) The Implant Issue Operations group oversaw certain already-existing functions that continued after the controversy erupted, including: a Medical Device Reporting group charged with investigating product complaints and regulatory compliance,[4] and a claims resolution function that worked to settle the relatively modest number of breast implant lawsuits filed before the early 1990s. The claims resolution function continued as the controversy grew, and part of its work was done by a newly-formed Customer Relations Department staffed in part by paralegals who, among other things, fielded increasingly numerous calls from claimants who might be interested in settling their claims and, in some cases, did so by executing a release and receiving an agreed-to dollar amount in settlement.



[4] Through this Medical Device Reporting group, Dow Corning assured its compliance with FDA Medical Device Reporting and Good Manufacturing Practice regulations. (*See* 9/26/94 Complaint/MDR Team Mission Statement, Gerstacker Aff. Ex. B)

The Implant Issue Operations group also oversaw new functions added as the controversy and litigation grew in 1991 and 1992.

1. Implant Information Center.

The Implant Information Center ("Information Center") opened in July 1991. It offered a toll-free telephone number, sometimes referred to as the "Implant Hotline", for customers and others with questions regarding Dow Corning silicone breast implants. (*See* 6/25/92 Dow Corning Update, Affidavit of Nicole Abenth, attached hereto as Ex. 5 ("Abenth Aff."), Ex. A) The Information Center provided telephonic answers to questions, as well as informational brochures to physicians and their patients regarding breast-implant issues, including: FDA statements and positions, Dow Corning product information, including package inserts, and answers to frequently asked questions regarding alleged connections between breast implants and disease. (*See* Snow-Swantek Aff. ¶ 3; *see also, e.g.*, 1991 Information Center Informational Packet, Snow-Swantek Aff. Ex. A) The Information Center's associates and informational materials consistently emphasized that a patient's "physician is the most important source of information about breast implants," and recommended that women "should thoroughly discuss with [their] doctor[s] any questions or concerns [they] might have about silicone breast implants, breast surgery or the risks associated with both." (*See id.*; *see also* 6/22/93 Information Center "Do's and Don't's", Snow-Swantek Aff. Ex. B ("Encourage patients to discuss questions and concerns with the their doctors"); Snow-Swantek Aff. ¶ 4)

2. Removal Assistance Program.

In March 1992, new Dow Corning CEO Keith McKennon announced the new Removal Assistance Program available to "women who have a medical need to have their Dow Corning implants removed but who cannot afford the necessary surgical procedure." (3/19/92 Dow Corning Press Release, CAC Mem. Ex. 3) RAP was part of a broader announcement in which

Dow Corning committed to spend $10 million on major scientific studies of breast implant safety. Because those studies would take years to complete, however, Dow Corning felt it had to do something tangible and immediate to help women who wanted their implants removed promptly and to provide more balanced information to patients and the public.

McKennon made clear that the Program would be limited to women who (a) had "agreed with their physicians that, for medical reasons, her implant(s) need to be removed, and (b) could not "afford the [explant] procedure," and (c) whose removal surgery was performed on or after January 6, 1992. (*Id.*; 3/29/93 RAP Outline, Snow-Swantek Aff. Ex. C)[5] In addition, the RAP announcement openly disclosed that the financial assistance provided under the Program would be limited to a maximum of "$1200 to support the medical costs of the removal procedure." (*Id.*; *see also* 3/17/92 RAP Outline, CAC Mem. Ex. 5) Dow Corning did not feel at the time that it could afford to pay all explant surgery costs for all patients, and it was careful not to oversell the program or state that the company would pay all costs. Dow Corning couched the RAP payment as no more and no less than what it was: "support" and "Assistance" toward the costs of explant surgery.

Although the CAC now scoffs at the $1,200 payment, approximately 5,000 women found it acceptable and took the offer. In total, Dow Corning provided approximately ***$6 million*** in

[5] The CAC implies that Dow Corning's provision of RAP financial support only to those who could not afford the explant surgery reflects a secret intention "to target financially distressed and emotionally vulnerable women." (CAC Mem. at 6-7) Of course, those who had no financial concerns did not need an "assistance" program. Although the CAC points to a "draft" Press Release that disclosed that the program was "designed" to help women with "no money, and no insurance coverage, but who need[] the implant removal procedure," (*id.* at 6), the fact is that this exact language (and the financial need requirements of the RAP) was reflected in the ***final*** Press Release cited by the CAC in the first pages of its memorandum. (*See id.* at 1-2 (quoting Mar. 19, 1992 Press Release, CAC Mem. Ex. 3)) Consequently, this "draft" Press Release -- like other documents or portions of documents cited by the CAC -- provides no support for the claimed "secret" nature of any component of the RAP.

payments to these RAP participants, an amount that can hardly be called stingy. (Snow-Swantek Aff. ¶ 6)

The RAP did ***not*** require a release of potential claims against Dow Corning. As stated in an outline of the Program, "[p]articipation in this [removal assistance] program will not require a release of your potential claims against Dow Corning." (*See* Snow-Swantek Aff. ¶ 7; *see also* 3/29/93 RAP Outline; 8/21/92 letter from B. Snow-Swantek to M. Dean, Snow-Swantek Aff. Exs. C, D ("Dow Corning has consistently stated that participants in the [Removal Assistance] Program need not execute a release of liability to participate"))[6]

Critically, despite the absence of release requirements for the RAP, the Court should reject any implication that, with the launch of RAP, Dow Corning was somehow legally precluded from ever again requiring releases in exchange for monetary payments to breast implant claimants. Indeed, the same 1992 hearing transcript upon which the CAC relies illustrates this point. The CAC itself concedes that, during this hearing, United States District Court Judge Rubin "observed that . . . Dow Corning was free to seek releases from claimants if it did so openly." (CAC Mem. at 4, (quoting 3/27/92 Hrg. Tr., *In re Breast Implant Litig*. No. C-1-92-057 at 15, CAC Mem. Ex. 4) As shown in the evidence recited in this brief, that is precisely what Dow Corning did.

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[6] As noted by the CAC, Dow Corning's initial RAP outline indicated that program participants may be required to sign a limited release specifically for claims "relating to the removal operation" for a brief period after the inception of the RAP. (*See* CAC Mem. at 2-3 and CAC Mem. Ex. 1; *see also* CAC Mem. at 5, n.3) To the extent such limited releases were ever required or solicited as part of the RAP, the requirement was terminated almost immediately. Indeed, by March 25, 1992 -- days after the initial announcement -- any and all release requirements for RAP participants were lifted. (*See* 3/25/92 Dow Corning Update, Abenth Aff. Ex. B) Dow Corning is not aware of any Settlement Facility claimants who executed the RAP releases during these initial few days. Consequently, this issue (aside from providing basic background information) is inapposite to the Motion before the Court.

The RAP and Information Center were under the same supervision and shared the same toll-free phone number. (*See* 1992 Dow Corning Breast Implant Support Information, Snow-Swantek Aff. Ex. E) Information Center associates would receive and pre-screen calls, answer product-related questions, and, if appropriate, transfer the caller to a RAP representative who would explain the Program and work with the caller to begin the application process. (Snow-Swantek Aff. ¶ 8) Because the RAP was designed to offer a streamlined and efficient payment option with minimal documentation requirements, its representatives did not undergo training on general breast implant-related issues, unlike, for example, the associates answering general product questions and providing resource materials through the Information Center's hotline. (*Id.* at ¶ 9)

Following the provisional signing of the April 1994 Global Breast Implant Litigation Settlement Agreement (an agreement that ultimately failed), Dow Corning provided written notification that the RAP program would be terminated in May 1995. (Snow-Swantek Aff. ¶ 10)

3. Customer Relations Department/Claims.

The Customer Relations Department ("CRD" or "Claims") grew out of Dow Corning's traditional claims-processing function that existed before the breast-implant controversy. Like other companies, Dow Corning had historically employed customer relations personnel to address customer complaints in all facets of its operations, including complaints regarding medical devices. Also like other claims processing departments, Dow Corning's claims unit sought to resolve such claims or complaints through various methods, including settlement of potential litigation. (*See* Abenth Aff. ¶ 3)

When the volume of claims grew explosively in 1992, Dow Corning created an expanded claims unit, the Customer Relations Department; this unit continued the work, on a larger scale, of the company's pre-existing claims staff. In contrast to the streamlined, expedited financial

assistance program offered to qualified claimants under the RAP, the Claims/CRD group functioned as a typical claims processing center designed to resolve claims outside of litigation. (*See* Abenth Aff. ¶ 4) Consequently, it is neither surprising nor improper that one component of the CRD representative's job performance review reflected her ability to settle claims. (*See* CAC Mem. at 16-17) Nor is it surprising that Dow Corning's claims processors would be acquainted with applicable legal parameters and that they would report, as part of multiple lines of reporting responsibility, to the Legal Department. (*See* CAC Mem. at 11-13) It is unreasonable for the CAC to suggest that a company facing massive litigation should have operated its claims department in isolation from legal considerations and advice.

The Customer Relations Department was staffed and run separately from RAP. Dow Corning provided a toll-free phone number for its Customer Relations Department, which was different from the toll-free phone number shared by the Information Center and the RAP. Dow Corning's practice was to never transfer calls to the Customer Relations Department from the Information Center or RAP, but to provide callers with the Customer Relations Department toll-free phone number if appropriate. (Snow-Swantek Aff. ¶ 11)

B. Contrary To The CAC's Insinuations, Dow Corning Publicly And Clearly Distinguished The Two Options It Was Offering: RAP ($1,200 With No Release) And Claim Settlement (Requiring A Release).

The CAC claims that Dow Corning "privately" concocted a scheme to keep secret the requirement of a release to settle a claim. (*See* CAC Mem. at 8, 12) CAC member Sybil Niden Goldrich says she is "shocked to learn now that Dow Corning required women to sign a release and that they offered women more than $1,200." (S. Goldrich Aff. ¶ 13, CAC Mem. Ex. 7) These assertions are refuted by contemporaneous documents in which Dow Corning made clear the existence of differing options, the limits of the RAP, and the release requirements for settlement payments received outside of the RAP.

For example, Dow Corning informational brochures disclosed that, while "[p]articipation in [the Removal Assistance] program ***does not require a release*** of potential claims against Dow Corning," patients receiving monies through the "more formal product claims procedure" offered by the Customer Relations Department "***will be required to sign a release***." (1992 Dow Corning Breast Implant Support Information brochure, Snow-Swantek Aff. Ex. E (emph. added))

Throughout the pendency of the RAP, Dow Corning repeatedly made this distinction between the two options clear to patients, their doctors, and their attorneys. The following language from a 1992 letter to a claimant written by Customer Relations Specialist Shelley Blair is typical of these communications:

> [T]here are ***two options***. We have a Breast Implant Removal Assistance program which provides up to $1,200.00 towards the cost of the removal if it is medically necessary and you are financially unable to pay. To apply for this assistance, please call 1-800-442-5442.
>
> The ***second option*** is file a claim with my office. This payment policy is based upon an examination by our laboratory of the removed implants. If it appears your implant failed as a result of our materials or workmanship, we will assume financial responsibility for your reasonable, uninsured out-of-pocket expenses. Prior to making any claim for payment, ***we would require you to sign a release***.

(12/30/92 letter from S. Blair (CRS) to claimant,[7] Abenth Aff. Ex. C) The CAC makes much of the fact that Shelley Blair and many of her Customer Relations co-workers were paralegals, to which Dow Corning says "what's wrong with that?" These paralegals were properly engaged in the task of communicating with claimants and negotiating and documenting settlements where there was mutual agreement. The CAC's suggestion that these paralegals did something

[7] Names of claimants or patients (with the exception of those claimants who provided Statements submitted with the CAC's Motion) have been redacted to protect their confidentiality.

improper is contrary to the facts and insulting to these fine, decent employees. They were direct and honest in their dealings with claimants, and clear about the respective features of the no-release RAP offer and the release-requiring claim settlement program, as reflected in the illustrative letter cited above and many others. (*See, e.g.*, 12/30/92 letter from P. Barnes (CRS) to J. Johnson, M.D., Abenth Aff. Ex. E; 3/16/94 letter from C. Varner (CRS) to P. Corso, M.D., Abenth Aff. Ex. D; Group exhibit of exemplar letters, Abenth Aff. Group Ex. F)

C. Contrary To The CAC's Charge That The RAP Was Used To "Steer" Unsuspecting Women Into Signing Releases, Dow Corning And RAP Personnel Avoided Such Transfers.

The CAC insinuates that the RAP was used to "lure" unsuspecting women into one program and then surreptitiously "switch" those women to another program where they would then be tricked into executing a release.[8] The facts are to the contrary.

From the RAP's inception, Dow Corning trained its Information Center staff to carefully avoid any automatic transfer of inquiries regarding the RAP to its Customer Relations Specialists. (*See* Snow-Swantek Aff. ¶ 12) RAP personnel were also told that they should ***not*** forward telephone calls from RAP to Customer Relations in the event that the patient did not qualify for RAP. (3/20/92 handwritten notes of B. Snow-Swantek, Snow-Swantek Aff. Ex. F ("don't mention if this [RAP] program doesn't work forward you to claims")) Dow Corning provided the following script to RAP representatives for use if they determined the implant recipient did not qualify for RAP:

[8] *See, e.g.*, CAC Mot. at 4 ("The [RAP] was devised to attract and pull in the most financially desperate women" who were then unknowingly "transferred to Dow Corning paralegals" who extracted releases with legal implications which these women did not understand); *see also* CAC Mem. at 8 (accusing Dow Corning of using its RAP program to "steer women to its Legal Department," where they were "induced" into signing releases without full consent).

> We appreciate your call about our Implant Removal Program. We have carefully defined the program and are sorry that the facts of your situation do not meet the requirements. We have a more formal claims procedure with more complex criteria which may be of value to you. ***We cannot advise you whether you should call or not***, but if you choose to do so, the number is . . . If you choose to call this number, please tell the operator that you already talked to a removal assistance program representative.

(5/5/92 Rev., "For Patients Who Do Not Meet Program Requirements," Snow-Swantek Aff. Ex. G (emph. added))[9]

Most RAP callers were never referred to and never filed claims with the Customer Relations Department. (*See* Snow-Swantek Aff. ¶ 13 (reporting that only 16 percent of RAP callers were referred to CRS))[10] Indeed, Information Center associates were instructed that the default assumption was that callers were not seeking, and therefore should not be referred to, a Customer Relations Specialist for assistance.[11] (*See* Snow-Swantek Aff. ¶ 12)

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[9] At times, patients who were referred to CRS "ended up back with Removal Assistance." (4/29/92 e-mail from B. Snow-Swantek to M. Biggs, Snow-Swantek Aff. Ex. H)

[10] That is not to say that there was no coordination between the RAP and the CRD groups. For example, a qualified claimant could recover up to $1,200 under the RAP without releasing claims against Dow Corning. If the same claimant sought additional monies and otherwise met the settlement requirements of the CRD, she could obtain additional money, subject to a deduction for money received through the RAP and the execution of a release. However, if the claimant had settled her claim with the CRD and executed a release prior to seeking financial assistance through the RAP, she would not qualify for the RAP because the release would bar all breast-implant-related (or other released) claims against Dow Corning. (*See* Abenth Aff. ¶¶ 6-7)

[11] For instance, a 1994 memo instructed:

> "[g]enerally when callers state they want information on filing a claim, how to obtain money, etc., they may or may not want to talk to our Customer Relations Department. Associates will need to pre-screen the call and determine what the caller is asking for. The majority of callers will be looking for information on either the Removal Assistance Program or the Breast Implant Global Settlement.
>
> ***

(Footnote Continued . . .)

D. The CAC Erroneously Confuses The Implant Information Center With The Separate Customer Relations Department.

The CAC devotes a substantial portion of its "Statement of Facts" to painting a contrasting image of sophisticated, legally-savvy Customer Relations personnel as opposed to the "untrained" neophytes purportedly staffing the RAP. The CAC draws this image largely from a rough transcript of a March 1992 Implant Hotline Training program led by Paulette Williams. (*See* CAC Mem. at 8-11 & CAC Mem. Ex. 6) However, the CAC mischaracterizes this transcript on almost every point.

For example, the CAC erroneously categorizes the Customer Relations Department as one of two "claims unit[s] within the Information Center." (CAC Mem. at 11) As explained above, the Customer Relations Department (which settled claims) was separate from the Information Center (which answered the 800 hotline). In this manner, to the extent the CAC attempts to use the extensive training outlined in the March 1992 transcript to illustrate the training of ***Customer Relations Specialists***, this rough transcript is inapplicable.[12] The training

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(. . . Continued Footnote)

> When a caller asks the association for information on "options," it should be interpreted to mean the information/services from Information Center or Removal Assistance are discussed, the lat[t]er by the [RAP] representative.

(4/30/94 memo re Referrals to Customer Relations, Abenth Aff. Ex. M) The memo also outlined the limited circumstances where referral to the Customer Relations Department would be implicated, including: "(1) Caller has already talked to Removal Assistance and demands money/compensation; (2) Caller has already talked to Removal Assistance, states he/she does not want to hire an attorney and/or wants to work direct with Dow Corning; (3) Caller heard that DC is settling out of court; [and] (4) Caller states his/her Doctor/friend told him/her that Dow Corning is paying more than $1200." (*Id.*)

[12] As of March 1992, Ms. Williams served as a supervisor for the Implant Information Center. She did not transfer to the separate Customer Relations department until September 1992. (*See* P. Gerstacker Aff. ¶¶ 4-5; *see also* 8/12/91 Dow Corning Update, Gerstacker Aff. Ex. C ("Paulette (P.J.) Williams has been promoted to Supervisor, Implant Information Center"); 9/22/92 Dow Corning Update, Gerstacker Aff. Ex. D ("Paulette (P.J.) Williams has been named Senior Customer Relations Specialist, Customer Relations Department, from Supervisor, Implant Information Center"))

depicted through the transcript was for people answering the phones in the Implant Information Center -- not the separate Customer Relations or Claims Department.

Similarly, the CAC incorrectly asserts that the Customer Relations Specialists and RAP shared the same toll-free phone number. (*See* CAC Mem. at 8) In fact, it was only the Information Center and the RAP that shared a toll-free number. The Customer Relations Department had a ***separate*** toll-free phone number; pursuant to standard protocol, calls were ***not*** transferred from the Information Center or the RAP to the Customer Relations Department. (*See* Snow-Swantek Aff. ¶ 11; 1992 Dow Corning Breast Implant Support Information, Snow-Swantek Aff. Ex. E) Consequently, the Implant Hotline Training transcript's reference to transferring "a call that really belongs to the other group, the ***program*** group," does not reflect (as claimed by the CAC) a transfer to the Customer Relations Department. (CAC Mem. at 8, n.7 (emph. added)) Rather, it describes the process for transferring calls to the ***Removal Assistance Program*** -- the very Program from which the CAC asserts callers were "steered" away. (*See* Snow-Swantek Aff. ¶ 11)

As the foregoing examples illustrate, the CAC's selective reliance on this "transcript" (like its reliance and characterizations of many other documents referred to in its Motion) fails to provide evidence supporting its request for broad, aggregate relief.

E. The CAC's Accusations That Dow Corning "Induced" Plastic Surgeons To Obtain Releases Are Baseless.

The CAC's claims of alleged improper inducements to plastic surgeons to obtain releases from their patients are similarly unsupported by the facts. The CAC's "inducement" allegations boil down to little more than sporadic examples of Dow Corning representatives seeking physicians' cooperation in facilitating their patients' access to available financial assistance when the patient so requested. (*See generally* CAC Mem. at 17-19)

Nor is there anything improper or unfair about some or all of the Dow Corning settlement payments going directly to the treating doctor. Claim settlements get paid to service providers in this and many other contexts, and the claimant gets the benefit of the payout whether it is in the form of cash paid directly to the claimant or services provided for the claimant's benefit. Indeed, the Settlement Facility Agreement (which the CAC endorsed) contemplates precisely the same type of cooperation and coordination to facilitate the reimbursement of costs incurred under the Explantation Payment Option:

> Breast Implant Claimants who want to have their Dow Corning Breast Implant removed but do not have the funds to pay for the surgery may request the Claims Office to make arrangements to compensate the appropriate persons or entities . . . directly.

(*See* SFA, Annex A, Arts. 6.02(c)(iv))[13]

II. THE CAC'S HAND-PICKED CLAIMANT STATEMENTS DO NOT REFLECT THE FACTS AND DEMONSTRATE THAT ANY CLAIMED RELIANCE ON ALLEGED RAP-RELATED REPRESENTATIONS VARIES FROM ONE INDIVIDUAL CLAIMANT TO THE NEXT.

The statements selectively submitted by the CAC provide little support for its cause. To the contrary, nearly all of the declarants are notably silent as to any alleged misleading communications ***from Dow Corning*** regarding the nature and scope of the releases. One declarant expressly admitted that "I did not have any discussions or correspondence with Dow Corning about the Release or circumstances regarding the Release." (S. Jamison Stmt. ¶ 6, CAC Mem. Ex. 2D) The other claimants either (1) identify alleged statements by non-Dow Corning personnel, such as their physicians' offices or, in one case, the representations of an unidentified

[13] The CAC itself has enlisted and recommended the cooperation of physicians and claimants in facilitating payments available under the Settlement Option. (*See* 2/24/06 CAC Electronic Newsletter, http://www.tortcomm.org/newsletter_060224.shtml, attached hereto as Ex. 6 (attaching downloadable "Dear Doctor" letter from the Claims Administrator, which is made available "[t]o help doctors better understand what the Settlement Option is and to assist claimants with obtaining Proof of Manufacturer and underlying records and/or letters to document claims."))

"man" who showed up a patient's door demanding she sign a release[14]; or (2) assert claimants' vague, unsupported "under[standing]" of the scope of the release at the time.[15]

Moreover, many factual averments contained in the statements are contradicted by contemporaneously created documents. For example, Bonnie Boyette describes her "shock[] and ang[er]" upon discovering that her doctor and Dow Corning had "spoken about [her] medical situation" without her authorization. (B. Boyette Stmt. ¶ 10, CAC Mem. Ex. 2A) However, Ms. Boyette had authorized her doctor to discuss her medical situation with Dow Corning Wright prior to her removal surgery. (*See* 9/4/92 B. Boyette Authorization To Release Medical Information, Abenth Aff. Ex. G) Similarly, in contrast to Ms. Boyette's claimed ignorance of communications between her physician and Dow Corning regarding her surgical costs (Boyette Stmt. ¶ 10), the documentary evidence confirms that such communications and payment arrangements were explained to her and that she "was fine" with such arrangements. (*See* 11/17/92 note re returned call, Abenth Aff. Ex. H ("explained we would have [checks] made payable for each client w/amount owed and checks to her for prescriptions -- She said that was fine"))

The contemporaneous notes of Dow Corning Customer Relations Specialists taken during conversations with Ms. Boyette further contradict her claims. While Ms. Boyette claims the

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[14] *See, e.g.*, B. Boyette Stmt. ¶ 6, CAC Mem. Ex. 2A ("doctor's office informed me that Dr. Dean would not see me again until I signed a release"); *id.* at ¶¶ 7-8 (describing encounter with "a man" who "showed up without calling or advance notice," who told her "that the release was only to pay for the costs of the surgery"); S. Jamison Stmt. ¶ 4, CAC Mem. Ex. 2D ("Dr. Weiskopf's nurse . . told me that the release was only to allow Dr. Weiskopf to be paid for his costs in removing and replacing the leaking breast implants"); L. K. Ai Stmt. ¶ 9, CAC Mem. Ex. 2E ("[Dr. Villacana] told me that by signing the document I was only agreeing that he could be paid by Dow Corning").

[15] *See* N. Diaz Stmt. ¶ 6, CAC Mem. Ex. 2B; V. Wappel Stmt. ¶¶ 6, 8, CAC Mem. Ex. 2C; S. Schmidt Stmt. ¶ 6, CAC Mem. Ex. 2F.

"first time that [she] had been told about or heard about a release being required" was on or about "October 19, 1992," (Boyette Stmt. ¶ 6), the facts show that Dow Corning Customer Relations Specialist had repeatedly discussed the release requirement and that Ms. Boyette had repeatedly indicated that she "***had no problem [with] signing a release***." (*See* 9/11/92 notes re PCF [phone call from] B. Boyette, Abenth Aff. Ex. I (emph. added); *see also, e.g.*, 9/3/92 notes re [phone call from] B. Boyette, Abenth Aff. Ex. J ("no problems w/release"))[16] These notes also reveal that a Dow Corning Customer Relations Specialist told Ms. Boyette that Dow Corning "would have hosp[ital and doctor] send [the Dow Corning Customer Relations Specialist] her bills and then call her . . . and have a release sent out to her," which, once she signed the release, would allow a check to be issued. Ms. Boyette "said this was fine." (*Id.*)

Other statements are also called into question by contemporaneous documents kept by Dow Corning. For example, declarant Neldy Diaz states that she heard about the Removal Assistance Program and contacted Dow Corning, which told her that it would not reimburse her for the costs of the surgery unless she signed a release. (N. Diaz Stmt. ¶ 4) But Ms. Diaz received a letter from Lynn Diebold, a Customer Relations Specialist, delineating the fact that she had two options: to receive $1200 under the RAP or to file a claim with Dow Corning, in which case she would be "require[d] to sign a release." (4/14/92 letter from L. Diebold to N. Diaz, Abenth Aff. Ex. K) Similarly, Vy Wappel contends that she "would not have signed the Release form if [she] had been told . . . it was a release of all of my rights against Dow Corning." (V. Wappel Stmt. ¶ 6) Yet Ms. Wappel received a letter from Mamie Goetterman, Customer

[16] Dow Corning believes that the types of documents referenced in this Response would have been included in the numerous productions made to the Document Depository. However, given the time constraints for filing this Response and the time-consuming nature of matching the documents found in Dow Corning's files to bates numbers reflecting their placement in the Depository, Dow Corning has reproduced these documents from its files, as indicated in the supporting affidavits attached hereto.

Relations Specialist, which stated, "if you resolve your claim with Dow Corning and sign a Release, then you will not be able to pursue any other claim against Dow Corning relating to breast implants." (6/7/93 letter from M. Goetterman to V. Williamson, Abenth Aff. Ex. L)

Finally and critically, as the CAC's own characterizations show, the circumstances surrounding the execution of and understandings regarding the scope of the releases varied among even the six hand-selected claimants. For example, only three of the six claimants contend that they could not have afforded the surgery. (*See* CAC Mem. at 24) Under the RAP's terms, the three remaining women, who apparently could have afforded the surgery, would not have qualified for the RAP in the first place. Similarly, only three of the six claimants allege that they "relied on claims by Dow Corning that the [RAP] did not require a release of all claims." (*See id.* at 25) As discussed below, the absence of such reliance by at least half of these exemplar claimants not only bars attempts to void their releases based on fraud or other equitable doctrines, but also confirms the lack of "common facts" applicable to the unidentified class of claimants on whose behalf the CAC purportedly brings this Motion.

ARGUMENT

I. THE CAC'S MOTION FOR DECLARATORY RELIEF IS PROCEDURALLY DEFECTIVE.

The CAC's "motion" for declaratory relief must be dismissed because, under the plain language of the Bankruptcy Rules (and incorporated Federal Rules of Civil Procedure), a declaratory judgment cannot be obtained without filing a complaint. In particular, a proceeding to obtain "declaratory judgment" seeking equitable relief is an "adversary proceeding." *See* Fed. R.Bankr.Proc. 7001(7), 7001(9). Rule 7003 further directs that Federal Rule of Civil Procedure 3 applies in adversary proceedings. And Rule 3, in turn, provides that "[a] civil action is commenced by filing a ***complaint*** with the court." Fed.R.Civ.P. 3 (emph. added).

The normal requirements of pleading and practice apply to a party seeking declaratory relief. *See* 10B FED. PRAC. & PROC. CIV. 3D § 2768 ("[T]he requirements of pleading and practice in actions for declaratory relief are exactly the same as in other civil actions. Consequently the action is commenced by ***filing a complaint*** . . . ."). For this reason, "a party may not make a ***motion*** for declaratory relief, but rather, the party must bring an ***action*** for a declaratory judgment." *Int'l Bhd. of Teamsters v. E. Conference of Teamsters*, 160 F.R.D. 452, 456 (S.D.N.Y. 1995) (emph. added); *see also The Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492, 502 (D.N.J. 1995) ("Since Defendants' [sic] have failed to file any pleading upon which a declaratory judgment could be based, their motion for a declaratory judgment is denied."); *Pully v. Internal Revenue Serv.*, 939 F. Supp. 429, 440 (E.D. Va. 1996) ("to obtain declaratory relief, [plaintiff] would have had to file a separate complaint, and pursue the matter as he would any other cause of action"; plaintiff "cannot evade this requirement merely by couching his request in the form of a 'motion'"). The CAC must file a complaint to obtain the relief it requests through the impermissible means of its Motion.

Filing a complaint for declaratory relief is not a mere technicality. Rather, it serves the important function of ensuring that all necessary parties have been joined and are on notice that declaratory relief is being sought. This in turn ensures that the parties will be bound by the court's determination. Without these assurances, a court determining a request for declaratory judgment would be issuing nothing more than an advisory opinion that is not binding on all necessary parties. *See Stockton v. Gen. Accident Ins. Co.*, 897 F.2d 530, 1990 WL 20477, at *4 (6th Cir. Mar. 6, 1990) (stating that "it would have been necessary to join" certain persons to a counterclaim for declaratory relief; failure to do so "would prevent the district court from giving complete declaratory relief"); *Columbus Cmty. Cable Access, Inc. v. Luken*, 923 F. Supp. 1026,

1031 (S.D. Ohio. 1996) ("Proceeding to a declaratory judgment in the[ ] absence [of necessary parties]" would result in "piecemeal litigation" and would preclude "complete adjudication" of the case.).

Moreover, declaratory relief is not simply available to any person or entity just for the asking. As this Court recently reiterated, "[f]ederal courts are 'empowered to entertain declaratory judgment actions only where a party alleges facts that 'show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality.'" *Mozdzierz Consulting, Inc. v. Mile Marker, Inc.*, No. 04-CV-74925-DT, 2006 WL 799222, at *3 (E.D. Mich. Mar. 28, 2006) (Hood, J.) (quoting *Found. for Interior Design Educ. Res. v. Savannah Coll. of Art & Design*, 244 F.3d 521, 526 (6th Cir. 2001)). The Sixth Circuit's test for assessing whether a plaintiff "meets the requirements of Article III, and whether it is appropriate for a federal court to hear" the declaratory judgment action requires consideration of three questions:

> (1) whether the plaintiff has standing -- whether he is the proper party to request an adjudication of a particular issue, because he has suffered a concrete injury-in-fact; (2) whether the particular challenge is brought at the proper time and is ripe for . . . review; and (3) whether the issue currently is fit for judicial decision.

Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997). The CAC does not recite, let alone bear its burden of showing compliance with, any of these requirements.

For instance, the CAC does not attempt to show that it meets the "standing" requirement, a failure that raises concerns on at least two levels. *First*, the "party" bringing the motion is not a claimant denied participation in the Settlement Option, but rather is a Committee whose own

rights or potential injuries are not at issue.[17] *Second*, the "relief" requested -- even if granted -- is unlikely to redress any claimed injury. *See Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001) (to satisfy Article III's standing requirement, plaintiff must show, *inter alia*, "a substantial likelihood that the relief requested will redress or prevent [the] injury"); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Motion seeks a declaration that releases solicited "as part of the Removal Assistance Program (or represented as part of such program)" "do[] not bar claimants from participating in the Settlement Option." (CAC Mem. at 33) Such a declaration begs the question of whether releases were actually solicited or obtained as part of the RAP -- a question which, according the CAC's own representations, at least three of its six exemplar claimants could not answer affirmatively. To determine whether the declaration actually affected any individual claimants' rights under the Program, some tribunal would still need to engage in an individual, case-by-case examination of the facts and circumstances before deciding whether a prospective claimant fell within the exception. Consequently, a declaratory judgment ruling would not "redress or prevent" any actual "injury," and thus, would be "not only worthless to [the CAC], it [would be] seemingly worthless to all the world." *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998).

Also of concern is that if the CAC's Motion is ruled upon -- whether granted or denied -- then that ruling would be binding upon individual claimants, some of whom might not want to be bound. These unnamed individuals did not consent to representation by the CAC on this issue

[17] The SFA does allow the CAC to "file a motion or take any other appropriate actions to enforce or be heard in respect of the obligations in the Plan and in Plan Documents." (*See* Settlement Facility and Fund Distr. Agreement ("SFA") § 4.09(c)(v)) However, as detailed elsewhere in this brief, the CAC's Motion here falls well outside any Plan provisions and, consequently, the CAC cannot invoke this provision to bootstrap standing to bring the instant Motion. In addition, permitting the CAC standing here is tantamount to giving the CAC *carte blanche* to interpose themselves "on behalf" of every claimant whose claim has been disallowed -- all at the expense of the Settlement Facility.

and did not consent to this Motion being filed on their behalf. Yet the Motion implicates their due process rights; by seeking relief for individual claimants, it precludes those claimants from presenting their particular circumstances to the Court and from being heard.

II. THE CAC MAKES NO SHOWING THAT AGGREGATE ADJUDICATION IS PROPER UNDER THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE.

Seeking a generic ruling applicable to unidentified claimants, the CAC's motion effectively attempts to consolidate multiple claims into one action without a showing that aggregated claims resolution procedures are justified and without attempting to grapple with the due process rights implicated by such actions. *See, e.g.*, Fed.R.Civ.P. 19(a) (requiring joinder of persons whose absence may "(i) as a practical matter impair or impede the person's ability to protect [her] interest or (ii) leave any persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest"); Fed.R.Civ.P. 23(b)(2) (upon showing prerequisites to class action under Rule 23(a) have been met, allowing class actions to be maintained if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"); Fed.R.Civ.P. 42 (allowing consolidation of actions "involving a common question of law or fact."). *See also* Fed.R.Bankr.Proc. 7019, 7023, 7042 (incorporating Federal Rules of Civil Procedure 19, 23, and 42).

The only reference to these crucial issues is found nestled in one unsupported conclusory statement that "[g]lobal disposition of such claims is appropriate in light of the common facts presented by the cases of most claimants." (CAC Mot. at 4 [Dkt. No. 332]) No statutory citation or other legal basis justifying the CAC's request for extraordinary blanket relief is provided. There is no mention of Rule 23 or other vehicles for seeking blanket relief affecting a

broad group, and for good reason: group relief is not merited under any potentially applicable law. As discussed in the background facts above, the CAC has not shown and cannot show the requisite nucleus of "common facts" as to the six "representative" claimants -- let alone as to the additional, unidentified claimants on whose behalf the CAC purportedly brings this Motion.[18]

III. THE JOINT PLAN DOES NOT PROVIDE FOR THE TYPE OF BLANKET ADJUDICATION OF THE VALIDITY OF PRE-PETITION RELEASES NOW REQUESTED BY THE CAC, AND THE CAC'S ATTEMPT TO REWRITE THE PLAN SHOULD BE REJECTED.

The Joint Plan's definition of "Breast Implant Claims" excludes "any such Claims which were the subject of prepetition final judgments or legally enforceable settlement agreements, which Claims shall be treated as Unsecured Claims in this Plan." (*See* Am. Jt. Plan Art. 1.18; *see also* SFA § 7.02(b)) The SFA similarly precludes the renewal of released claims, stating: "To be eligible to participate in the Dow Corning Settlement Program the Claimant must [not have] released the Claim against Dow Corning or its Shareholders." (Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA, Art. 5.01(a))

Despite the Joint Plan's clear exclusion of released claims, neither the Plan nor the Settlement Facility Agreement provides specific procedural guidelines governing the adjudication of the scope or validity of pre-petition releases. Recognizing the need to address disputes, the Debtor's Representatives and the CAC negotiated and presented to the Court an agreed procedure to resolve disputes regarding the effect of prior releases on a claimant's ability to participate in the Settlement Option. (*See* Dec. 23, 2004 Stip. & Order for Res. of Disputes re

[18] Indeed, the tautological defined scope of "relief" is reminiscent of the illegal "fail-safe" class definition often raised and rejected in the context of Rule 23. *Cf., e.g., Nudell v. Burlington N. and Santa Fe Ry. Co.*, No. A3-01-41, 2002 WL 1543725, at *2 (D.N.D. July 11, 2002) (fail-safe class is "a class which cannot be defined until the case is resolved on its merits, meaning potential class members are only bound by a favorable decision; an unfavorable decision on the merits would be the same as a class membership decision and would come late enough to allow them to opt out of the class.").

Release of Claims, Dkt. No. 78, CAC Mem. Ex. 1) These agreed procedures could have provided the mechanisms for claimants at issue in the instant Motion to have the validity and effect of their pre-petition releases heard and decided in an efficient and streamlined manner.

However, ***at the CAC's insistence***, the very claims that are now the subject of its Motion for blanket relief were excluded from these agreed procedures. (*See* CAC Mem. Ex. 1, Exhibit A (procedures shall not apply to "(1) Claims alleging the Plan does not bar recovery under the Settlement Option where an unrepresented Claimant signed a release in exchange for a payment of less than $15,000 during the period 1992 through May 15, 1995 and (2) Claims alleging that the release was provided in connection with the Dow Corning Removal Assistance Program"))

Having rejected the sensible option of simply applying the previously agreed procedures to the instant claimants with release issues, the CAC now attempts to use a motion for "declaratory relief" to rewrite the Plan terms in a manner that was neither negotiated for by the parties to the Joint Plan, nor voted on by Dow Corning's creditors, nor approved by this Court. In particular, rather than attempting to amend the Plan or the SFA through procedures expressly provided in the Plan (*see* SFA Art. 10.06), or allowing individual claimants to seek redress through available appeals mechanisms encompassed in the SFA (*see* SFA, Annex A, Art. 8.0 *et seq.*), the CAC attempts to unilaterally impose new procedural mechanisms for and ask this Court to preside over an unauthorized request for generic relief purportedly applicable to an unknown number of unidentified claimants who have not been given an opportunity to participate.

The CAC's attempt to rewrite Plan terms violates fundamental contract principles and must, therefore, be rejected as a matter of law. "Interpretation of a Chapter 11 plan is basically a matter of contractual interpretation." *In re Beta Int'l, Inc.*, 210 B.R. 279, 285 (E.D. Mich. 1996);

see also In re K-Mart Corp., 307 B.R. 586, 596 (Bankr. E.D. Mich. 2004) ("bankruptcy plans of reorganization, no matter how complicated, are contracts"). "When interpreting a contract, courts first look to its plain language for any manifestation of intent." *In re Beta Int'l, Inc.*, 210 B.R. at 285. Simply put, the Plan's "plain language" does not allow for the relief sought by the CAC.

Even worse, the CAC's grounds for rewriting the Plan consist of "facts" and documents more than a decade old. All of the documents and events cited regarding the Removal Assistance Program, the terms and negotiation of releases, and claimants' circumstances were known and disclosed before the Plan was negotiated and approved. With that knowledge, the Plan was negotiated, thoroughly tested at a confirmation hearing, overwhelmingly supported by the vast majority of claimants, challenged by some through appeals, and ultimately confirmed by this Court. The CAC has presented no new facts meriting the extraordinary relief it now seeks.

IV. THE CAC HAS PROVIDED NO LEGAL BASIS UPON WHICH TO ISSUE A BLANKET RULING INVALIDATING UNAMBIGUOUSLY BROAD RELEASES.

The CAC is long on inflammatory insinuation, but short on legal support for its attack on the Dow Corning Removal Assistance Program. Indeed, less than four pages of its 32-page memorandum mention any legal authority whatsoever.[19] And several of these references are drawn from a smattering of jurisdictions (Montana, Alaska and Vermont) that house few claimants whose rights might be affected. Few claimants overall, and none of the "representative" claimants identified by the CAC, reside in these states.

Despite the paucity of legal support advanced by the CAC, Dow Corning and the Debtor's Representatives offer the following brief response to outline why the CAC's requested

[19] *See* CAC Mem. at 26-29.

blanket "invalidation" of these releases should be denied on the merits (if the merits were to be addressed, which Dow Corning disputes). As an initial matter, the releases implicated by the Motion broadly and unambiguously released Dow Corning "from any and all claims, now known or unknown . . . arising from the use of the breast implant product and any procedure related thereto." In this circumstance, fundamental rules of contract interpretation, coupled with public policy considerations favoring the enforcement of settlements, provide the Court with ample legal authority to determine the scope of the releases and deny the Motion.[20]

Further, the circumstances surrounding the execution of the releases provide no basis, and certainly no global basis, upon which to void an entire group of releases and allow previously excluded claimants to seek compensation from the limited Settlement Fund.

- Unconscionability: None of the authorities cited by the CAC stand for the proposition that a release is only valid if the parties have equal bargaining power. And the CAC has failed to cite facts amounting to unconscionability sufficient to void a contract. A contract is not unconscionable simply because a party "made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him." *Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. 3rd Dist. Ct. App. 1982).[21] Unconscionability requires extreme facts such as a release procured shortly after the death of plaintiff's husband, when she was physically and

[20] *See generally* LF Mot. & Mem. In Supp. of Mot. for Summ. Jdgmt. of Previously Settled Claims, 00-CV-00001 [Dkt. No. 71]; LF Reply Br. in Supp. of Mot. for Summ. Jdgmt. of Previously Settled Claims, 00-CV-00001 [Dkt. No. 91], attached hereto as Exs. 2, 3.

[21] Rather, in order for a release or contract to be considered unconscionable, it must be both procedurally and substantively unconscionable. *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th Dist. Ct. App. 2003). "Procedural unconscionability refers to the individualized circumstances under which the contract is entered, while substantive unconscionability deals with the unreasonableness and unfairness of the contractual terms themselves." *Id.* To show procedural unconscionability, the plaintiff must have clearly had an "absence of meaningful choice." *Kohl v. Bay Colony Club Condo.*, 398 So. 2d 865, 869 (Fla. 4th Dist. Ct. App. 1981).

mentally incapacitated, had not slept in thirty hours, and was without money to meet her needs. *Fla. Power & Light Co. v. Horn*, 131 So 219, 221-22 (Fla. 1930).[22] Unconscionability obviously requires a determination of the facts in ***each*** individual case. In short, the CAC cannot proceed to argue unconscionability in some sort of ill-defined "aggregate" proceeding.

- Fraud: Similarly, the CAC fails to provide any evidence that its exemplar claimants -- let alone the larger group of unidentified claimants on whose behalf it purportedly seeks relief -- (i) relied on any (ii) representations by Dow Corning related to the RAP that were (iii) material to their decisions to execute the releases. This failure is fatal to the attempt to void or rescind the releases based on fraud. *See Peninsular Fla. Dist. Council of Assemblies of God v. Pan American Invest. & Dev. Corp.*, 450 So. 2d 1231, 1232 (Fla. 4th Dist. Ct. App. 1984) ("When fraud is asserted as a claim or defense, the facts and circumstances constituting the fraud must be pled with specificity, . . . and all essential elements of fraudulent conduct must be stated, i.e., that plaintiff relied to his detriment on a false statement concerning a material fact made with knowledge of its falsity and an intent to induce reliance."); *Allstate Ins. Co. v. Eskridge*, 823 So. 2d 1254, 1264 (Ala. 2001) ("A claim of fraud, including such fraud as fraud in the factum, requires the party making the claim to prove by substantial evidence that he or she reasonably relied on the alleged misrepresentation.").[23] And, as with unconscionability, determinations of

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[22] *See also Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1376 (Cal. Ct. App. 1996) (stating that substantive unconscionability is "not only a one-sided result, but also the absence of any justification for that result"); *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App. 2005) (stating that, with respect to unconscionability, "[t]he grounds for substantive abuse must be sufficiently shocking or gross to compel the court to intercede, and the same is true for procedural abuse -- the circumstances surrounding the negotiations must be shocking").

[23] *See also* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981), cmt. a ("A misrepresentation may make a contract voidable under the rule stated in this Section, even thought it does not prevent the formation of a contract under the rule stated in the previous section. Three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation

(Footnote Continued . . .)

fraud are subject to a bevy of individual, case-specific issues, including actual "reliance" on the purported misrepresentations.

- Unilateral Mistake: "[T]o set aside an unambiguous agreement[,] it is insufficient to simply allege and prove a unilateral mistake." *Ghahramani v. Guzman*, 768 So. 2d 535, 537 (Fla. 4th Dist. Ct. App. 2000). Although exceptions to this general rule exist, they apply in only the limited circumstances where the party seeking to avoid the agreement shows that:

> (1) the mistake was induced by the party seeking to benefit from the mistake, (2) there is no negligence or want of due care on the part of the party seeking a return in the status quo, (3) denial of release from the agreement would be inequitable, and (4) the position of the opposing party has not so changed that granting the relief would be unjust, a unilateral mistake may provide a basis for rescission of a contract.

Id. at 538 n.1. The CAC has provided no evidence supporting the application of this exception to the six example claimants referenced in its brief -- let alone on the broad, generic level as requested by the Motion.

Finally, the Court should reject any attempt by the CAC to invoke its procedurally and substantively improper "Motion" as a vehicle to try to "prove" its allegations by launching head-first into protracted and contentious discovery. (*See* CAC Mot. at 5, n.2 [Dkt. No. 332] ("Discovery, including depositions of Dow Corning, may be necessary.")) For starters, ample discovery was already done, more than ten years ago. Moreover, the CAC's failure to file the requisite complaint or otherwise make any showing of the availability and applicability of aggregate relief has left Dow Corning and the Debtor's Representatives in the dark as to the

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(. . . Continued Footnote)

must have been either fraudulent or material. Second, the misrepresentation must have induced the recipient to make the contract. Third, the recipient must be been justified in relying on the misrepresentation.").

number and identify of claimants on whose behalf the Motion was purportedly filed. Absent compliance with these most basic pleading requirements, neither the Court nor Dow Corning should be forced to prematurely and needlessly expend time and resources addressing discovery issues.

CONCLUSION

For all of the foregoing reasons, Dow Corning and the Debtor's Representatives respectfully suggest that the Court need not reach the merits of the CAC's Motion, but rather should consider working with the parties to amend the existing "Release Procedures" to include the claimants on whose behalf the CAC purports to seek relief. In addition (or in the alternative), Dow Corning and the Debtor's Representatives respectfully request that the Court enter an order denying or striking the CAC's Motion in its entirety.

May 19, 2006

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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	§	

CERTIFICATE OF SERVICE

I hereby certify that on May 19 2006 a true and correct copy of the following pleading was served via electronic mail, telecopy, or overnight mail upon the parties listed below:

DOW CORNING CORPORATION AND THE DEBTOR'S REPRESENTATIVES' RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DECLARATORY RELIEF REGARDING RELEASES

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