EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION	Civil Action No. 00-CV-00001 (Litigation Facility Matters)
	The Honorable Denise Page Hood
_____/	
Carole P. Edwards v. DCC Litigation Facility Inc.	MIE#: 05-CV-30142
Diane Russell v. DCC Litigation Facility Inc.	MIE#: 05-CV-30158 (N.D. Ga. No. 93-CV-1687)
Loisan Thompson v. DCC Litigation Facility Inc.	MIE#: 05-CV-30159

DCC LITIGATION FACILITY, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF PREVIOUSLY SETTLED CLAIMS

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INTRODUCTION

The dispositive question is whether the language in the release executed by each of three Claimants is unambiguous. It is. The four corners of the release, under any plain and reasonable reading of its terms, extinguished the entirety of Released Claimants' claims, not just surgical costs. Because the release language is unambiguous and the prior settlement thus is valid, Released Claimants' only remaining option to avoid the effect of the settlements is to engage in rhetoric about "fraud" and allegedly unethical conduct by Dow Corning customer representatives and other "equitable" issues. *See, e.g., Campbell v. Colonial Bank*, 678 So.2d 189, 191 (Ala. Ct. App. 1996) ("[N]o reason exists to allow extrinsic evidence to contradict these findings, absent allegations of fraud, duress, mistake, incompetency, or undue influence.").

However, the Litigation Facility will demonstrate that neither unfounded and unsupported allegations regarding Dow Corning's implant Removal Assistance Program, nor any claims of "mistake," duress, or unconscionability, provide sufficient legal or factual bases to avoid summary judgment. And the undisputed fact that each of the Released Claimants cashed their settlement checks and has never returned the funds -- a necessary predicate to voiding a prior settlement on grounds of fraud -- offers an additional bar to their attempt to avoid the legal import of these broad, unambiguous releases.[1]

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[1] Liaison Counsel devotes considerable attention to argument regarding choice-of-law issues. (*See* Plaintiffs Liaison Counsel's Resp. [Dkt. No. 83] at 11-15.). However, as explained in the Litigation Facility's opening brief, choice-of-law issues need not divert the parties or the Court for long. (*See* Litig. Facility. Mem. Supp. Mot. for Summ. Jgmt. at 2-3 [Dkt. No. 71].) For regardless of whether the Court applies the law of the forum state (Michigan) or other states with potential contacts to the events at issue (*e.g.* Florida or Alabama), the result will be the same. Although the Litigation Facility maintains that the Court should apply the forum state's law in this situation, to avoid an unnecessary dispute, the Litigation Facility will simply apply (as urged by Claimants) the laws of Florida and Alabama in this Reply.

However, the Facility does wish to clarify one issue. Liaison Counsel poses a false dichotomy when it attempts to cabin this Court's jurisdiction as either federal question or diversity. Of course this Court's jurisdiction arises under Bankruptcy Code provision, 28 U.S.C. § 1334(b). Such jurisdiction may involve state-law or federal-law claims or both.

With regard to claims purportedly based on Dow Chemical conduct, those are likewise immaterial to granting summary judgment on claims asserted against Dow Corning. Frankly, the Litigation Facility had not previously imagined that any of the Released Claimants might be asserting Dow Chemical-based claims, since such claims are of dubious merit and none of these claimants had ever focused on claims based on alleged Dow Chemical conduct. But the solution is simple: partial summary judgment should be granted with regard to all claims except those based solely on Dow Chemical's conduct.

I. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE RELEASES BARS THE CLAIMS.

Claimants contend that the last sentence of the releases, which states "[t]his release is in settlement of a dispute as to the circumstances and cause of the corrective surgery," somehow modifies the broad language releasing Dow Corning "***from any and all claims, now known or unknown by me, arising from the use of the breast implant products and any procedure related thereto.***"[2] A common sense reading of this plain language lays to rest any arguments that the release is ambiguous. And, in such circumstances, the Court need not and should not consider any construction or supplementation from extraneous sources in construing the scope and effect of these settlements.

It is axiomatic that "[s]ettlements are highly favored as a means to conserve judicial resources, and will be enforced when it is possible to do so." *Feldman v. Kritch*, 824 So.2d 274, 277 (Fla. 4th Dist. Ct. App. 2002). Where the settlement -- like other contracts -- is "clear and unambiguous, the court is required to enforce the contract according to its plain meaning." *Id.* "It is never the role of the trial court to rewrite a contract to make it more reasonable for one of

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[2] *See* Plaintiffs Liaison Counsel's Resp. [Dkt. No. 83] (hereinafter "Liaison Resp.") at 17; Plaintiff Carole P. Edwards' Resp. [Dkt. No. 84] (hereinafter "Edwards Resp.") at 5-6; Resp. of Plaintiffs Diane Russell and Loisan Thompson [Dkt. No. 82] (hereinafter "Russell/Thompson Resp.") at 7.

the parties or to relieve a party from what turns out to be a bad bargain." *Id.* As the Court stated in *Vulcan Painters, Inc. v. MCI Constructors, Inc.*, 41 F.3d 1457, 1460 (11th Cir. 1995), "The issue of whether the district court erred in permitting Vulcan to present parole evidence to interpret the meaning of Change Order No. 7 and the Final Release hinges directly on whether those documents are ambiguous. If the documents are not ambiguous, parole evidence is inadmissible as a matter of law."

Even if this Court were to accept the Released Claimants' invitation to consider evidence outside of the four corners of the releases, such extra-contractual evidence confirms the appropriateness of summary judgment. Each of the claimants not only executed broad releases, but also received correspondence from Dow Corning indicating that execution of the release and receipt of the money would constitute full settlements of their claims. *See* 11/25/92 letter from M. Goetterman to C. Edwards, Affidavit of Nicole Abenth, attached hereto as Exhibit A ("Abenth Aff.") Ex. 1 ("[e]nclosed please find Dow Corning Wright's check in the amount of $7,216.00 ***in settlement of your claim***") (emph. added); 12/10/92 letter from P. Barnes to D. Russell, Abenth Aff. Ex. 2 ("[e]nclosed please find Dow Corning Wright's check in the amount of $1,142.06 ***in settlement of your claim***") (emph. added); 3/31/93 letter from P. Barnes to L. Thompson, Abenth Aff. Ex. 3 ("[e]nclosed please find Dow Corning Wright's check in the amount of $1,396.00 ***in settlement of your claim***").[3]

[3] Plaintiffs have urged that, as to the Released Claimants residing in Florida, the release cannot operate as a bar to claims that had not yet matured at the time the release was executed. (*See* Liaison Resp. at 11; Edwards Resp. at 5.) However, none of the Florida Released Claimants have identified or alleged any claims that had not matured at the time they executed the releases. To the contrary, Ms. Edwards identified the date of onset of each disease or illness alleged to be caused by her breast implants, including any symptoms, as beginning in 1980, 1984, or 1985 -- at least ***seven years before*** she executed the release. *See* 2/25/05 Notice of Intent To Litigate, Claimant Questionnaire (Edwards) at 6-7, attached hereto as Exhibit C; *see also* 11/5/92 Receipt and Release (Edwards), Abenth Aff. Ex. 4. Similarly, Ms. Thompson (the other Released Claimant residing in Florida) identified the vast majority of her 14 purportedly breast-implant-caused disease or illnesses as beginning prior to 1993 and, consequently, prior

These surrounding circumstances -- coupled with the plain language of the releases -- provide undisputed material facts showing that the releases operate to bar any further breast implant claims. As observed by Liaison Counsel, the scope and effect of these releases have been raised in connection with DCC's Settlement Facility.[4] In that context, mediator and former Texas District Court Judge Frank Andrews considered a virtually ***identical*** release and ruled that, "[c]onsidering the language of the 'Receipt and Release' as a whole together with the surrounding circumstances, . . . the clear language of the 'Receipt and Release' operates as a bar to any further claims related to breast implant products." *See* F. Andrews Ruling re Francis Netz; SID No. 0344520, attached hereto as Exhibit B.[5] Just as Judge Andrews found that the release constituted "a complete release and is a bar to [claimant's] claims asserted in the Settlement Facility - Dow Corning Trust," *id.*, so too should this Court find that the releases bar claims asserted against the Litigation Facility.

II. CLAIMANTS' ATTEMPTS TO RESCIND OR VOID THE RELEASES BASED ON CLAIMS OF FRAUD AND OTHER EQUITABLE ARGUMENTS FAIL.

Faced with such an unambiguous contract here, Claimants attempt to raise the specter of fraud or other purported inequities in the circumstances leading to the execution of the releases. Not only are such claims logically inconsistent with Claimants' acknowledgement of the formation of valid releases, but their attacks on Dow Corning's Removal Assistance Program

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to the execution of her release. *See* 2/28/05 Notice of Intent To Litigate, Claimant Questionnaire (Thompson) at 7-8, attached hereto as Exhibit D; *see also* 3/23/93 Receipt and Release (Thompson), Abenth Aff. Ex. 5. And, in any event, as to those alleged illnesses or diseases arising after the execution of the releases, where such illnesses and diseases were simply exacerbations of existing illnesses or diseases, the claims would still be barred. *See Van de Water v. Echols*, 382 So.2d 147, 148 (Fla. 4th Dist. Ct. App. 1980) ("It is settled that a release of a claim for personal injuries may not be avoided simply because injuries prove more serious than had been anticipated at the time of execution of the release.").

[4] *See* Liaison Resp. at 3-4.

[5] Although Judge Andrews later withdrew this ruling, his opinion continues to provide compelling support for the issues raised in this motion.

("RAP") and other equity-based arguments should also be rejected because they are factually and legally deficient.

A. Dow Corning's Removal Assistance Program Provides No Basis For Setting Aside The Releases.

1. Dow Corning's Replacement Assistance Program Was Fair and Appropriate.

Spawned by the controversy surrounding the use of silicone breast implants in the early 1990s, Dow Corning elected to provide financial assistance to breast implant recipients who, in consultation with their physicians, decided to have their implants surgically removed. (*See* 3/29/93 Dow Corning Breast Implant Removal Assistance Program Brochure, attached as Ex. B to Aff. of R. Ellis [Dkt. No. 85].) The resulting Dow Corning RAP provided such assistance.

However, as made clear in Dow Corning's promotional materials, neither the qualifications for the program nor its financial resources were without limits. Dow Corning disclosed that, among other things, the program would only apply to "implant removal surgery performed as of January 6, 1992," and required a patient to certify that "she is unable to pay for the removal surgery without the financial assistance provided under this program." (*Id.*) In addition, Dow Corning unequivocally limited available payments under the Program to "up to $1,200 of the medical expenses directly related to removal surgery that are not covered by insurance." (*Id.*) The RAP commenced in March 1992 and terminated in May 1995. (Abenth Aff. ¶ 3). In total, Dow Corning provided nearly ***$6 million*** in payments to over 5,000 program participants. (Abenth Aff. ¶ 3)

Potential RAP participants were directed to contact (either by toll-free 1-800 number or by mail) the Removal Assistance Program staff located in Midland Michigan. To the extent that potential applicants did not qualify for the RAP -- because, for instance, they sought financial assistance in excess of the $1,200 limit or because their removal surgery occurred before January

6, 1992 -- or otherwise sought assistance beyond that available in the RAP, the RAP staff transferred applicants to Dow Corning Customer Relations Specialists. In such circumstances, the Customer Relations Specialist would handle the case, and would make clear that a release was necessary to receive explant removal assistance beyond the RAP program. (*See* Abenth Aff. ¶¶ 4, 5.)

Claimants' insinuations that there was something sinister about the RAP (for which no release was required) as well as the second option of settling a claim, often for significantly more money, (for which a release was required) is simply unsupported by the facts. Dow Corning simply gave women two options, both of which were fair, and both of which women were free to accept or not.

2. Claimants Have Failed To Provide Evidence Of Reliance Or Materiality In Support of Their RAP-Related Fraud Claims.

Released Claimants fail to provide any evidence that (i) they ***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 Released Claimants' attempt to void or rescind the releases based on fraud. *See Peninsular Florida Dist. Council of Assemblies of God v. Pan American Invest. and 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."); *Oakwood Mobile Homes, Inc. v. Barger*, 773 So.2d 454, 456 (Ala. 2000) (same).[6]

While Liaison Counsel attacks the RAP and criticizes Dow Corning's alleged failure to inform the Released Claimants of pending litigation or their right to contact counsel (*see* Liaison Resp. at 6-7; *see also* Edwards Resp. at 9-10), there is no evidence that any of the Released Claimants ***relied*** on Dow Corning's representations regarding the RAP in making their decision to sign the release. To the contrary, with the exception of Ms. Edwards, none of the Released Claimants even alleges that she had heard of the RAP at the time she signed the release. (*See* Russell Aff. ¶ 10 (she "***now understand[s]*** that, in June 1992, Dow was offering a removal assistance program that did not require a release") (emph. added); Thompson Aff. ¶ 10 (she "***now understand[s]***" the removal assistance program did not require a release) (emph. added).)

And Ms. Edwards avers only that it was her "understanding that signing the release" was required for the RAP and provides no evidence that such understanding was the result of any representation by Dow Corning. (*See* Edwards Resp. at 7-8; Edwards Aff. at ¶¶ 7, 17, 18.)[7] To the contrary, as highlighted by Liaison Counsel, "Claimant Edwards never communicated with anyone from Dow Corning." (Liaison Resp. at 6.)

Nor is there any evidence or allegation that any purported representations regarding the RAP were material to the Released Claimants' decision to settle their claims. Regardless of

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[6] See also RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981), cmmt. 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 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.").

[7] Ms. Edwards' sole attempt to attribute unidentified and unspecified alleged misrepresentations to Dow Corning stems from unsupported allegations that her physician was acting as Dow Corning's "agent." (*See* Edwards Resp. at 9.)

whether the Released Claimants knew about the RAP, any such knowledge could not have been material to their decisions to execute the release because none of the Released Claimants would have even qualified for the RAP.

Both Ms. Edwards and Ms. Thompson fell outside the confines of participation in the program by seeking (and receiving) amounts in excess of the $1,200 limit. And Ms. Edwards would also have failed to qualify for the RAP for the additional reason that, as she testified, she would have been able to pay "for the surgery [her]self or sought coverage for the surgery from [her] health insurer." (Edwards Aff. ¶ 17) Consequently, she would have been unable to issue the requisite certification that "she is unable to pay for the removal surgery without the financial assistance provided under this program." (*See* 3/29/93 Dow Corning Breast Implant Removal Assistance Program Brochure, attached as Ex. B to Aff. of R. Ellis [Dkt. No. 85].) Similarly, Ms. Russell would have been ineligible for the program because her removal surgery occurred in October 1991 -- before the January 6, 1992 date specified by the RAP materials. Thus, any statements by Dow Corning about the RAP could not have been material.

B. Claimants' Attempts To Void Or Rescind The Releases Based On Unilateral Mistake, Duress, Or Unconscionability Also Fail.

1. Unilateral Mistake.

Ms. Edwards seeks to set aside the release based on a claimed "unilateral mistake" regarding the scope of the release. (*See* Edwards Resp. at 7-8.) However, Florida law is clear that "to 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). And Florida's exception to this general rule applies 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.

Ghahramani, 768 So.2d at 538 n.1.[8] Here, there is neither evidence that Ms. Edwards' purported mistake was induced by Dow Corning, nor evidence of due care on Ms. Edwards' own part.

Indeed, Ms. Edwards' affidavit suggests that she may not have even read the release due to her alleged understanding that there was nothing "unique" about the "routine" papers she was about to sign. (*See* Edwards Aff. ¶¶ 11-12.) Of course, it is axiomatic that "[a] person who signs a contract is on notice of the terms therein . . . even if he or she fails to read the document." *Harbison v. Strickland*, 900 So.2d 385, 387 n.2 (Ala. 2004) (quoting *Locklear Dodge City, Inc. v. Kimbrell*, 703 So.2d 303, 306 (Ala. 1997)); *see also Royal Ins. Co. of. Am. v. BHRS, LLC*, 333 F. Supp. 2d 1293, 1297 (S.D. Fla. 2004) ("Failure to read even the fine print of a contract will not save a party from his carelessness.").[9]

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[8] *See also Limehouse v. Smith*, 797 So.2d 15, 17 (Fla. 4th Dist. Ct. App. 2001) ("a party's performance under a contact is not excused on the basis of unilateral mistake when the mistake is the result of the party's own negligence and lack of foresight, or the other party has relied upon his performance so that rescission would be inequitable"); *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1291 (11th Cir. 1998) ("Florida case law allows for application of the unilateral mistake doctrine where all of the following conditions are met: (1) the mistake 'goes to the substance of the agreement,' (2) the error does not result from inexcusable lack of due care, and (3) the other party has not relied upon the mistake to his detriment.").

[9] *See also Sutton v. Crane*, 101 So.2d 823 (Fla. 2nd Dist. Ct. App. 1958) ("The rule that one who signs a contract is presumed to know its contents has been applied even to the contracts of illiterate persons on the ground that if such persons are unable to read, they are negligent if they fail to have the contract read to them. If a person cannot read the instrument, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents.") (quoting 12 Am. Jur., Contracts, Section 137)).

2. Duress.

Ms. Russell's duress claim boils down to one factual allegation -- that she was in "desperate need of money." (Russell/Thompson Resp. at 8.) However, in Alabama (and elsewhere), monetary needs, alone, fail to meet the rigid standards of duress. Economic duress "applies only in unusual or extraordinary situations where 'unjustified coercion' is utilized in order to induce the party to sign the contract." *Anderson v. Amberson*, 905 So. 2d 811, 818 (Ala. Civ. App. 2004). To succeed on her duress claim, Ms. Russell must show, among other things, that wrongful acts on the part of Dow Corning induced her to sign the release. *See Int'l Paper Co. v. Whilden*, 469 So. 2d 560, 562 (Ala. 1985) (claimant must show "(1) wrongful acts or threats; (2) financial distress caused by the wrongful acts or threats; (3) the absence of any reasonable alternative to the terms presented by the wrongdoer."); *see also Anderson*, 905 So. 2d at 818 (no economic duress when plaintiff "presented evidence indicating that he signed the release due to economic necessity" but did not present evidence "of a wrongful act ***on the part of the defendants*** that induced him to sign the release") (emph. added). Ms. Russell provides no evidence that wrongful acts on the part of Dow Corning caused her financial woes.[10]

Moreover, economic duress must be based upon more than the financial circumstances of the alleged victim. "The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating

[10] Ms. Russell cites *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849 (Ala. 1995) in support of her duress claims. *Newburn* involved plaintiffs who purchased a tractor on loan and later discovered that the tractor had 170,000 more miles on it than indicated in the odometer disclosure statement. *Id.* at 849-50. They returned the tractor to the dealer to get repairs on the tractor and told the manager of the incorrect mileage. Upon their return to pick up the repaired tractor, the dealer would not return the truck until the plaintiffs signed a general release and accepted a check absolving the dealer of claims arising from the incorrect odometer. The Alabama Supreme Court held that there was a question of fact as to whether this fact pattern constituted economic duress and stated that the "question of duress is ordinarily a matter for the jury." *Id.* at 851. Nevertheless, *Newburn* is distinguishable from Ms. Russell's case as the plaintiffs in that case were not merely signing the release because they needed money, but signing the release as a result of wrongful pressure exerted by the dealer.

the contract." *Id.* (quoting *Bd. of Sch. Comm'rs of Mobile County v. Wright*, 443 So. 2d 35, 38-39, *rev'd on other grounds*, 443 So. 2d 40 (Ala. 1983)).

3. Unconscionability Or Unequal Bargaining Power.

Ms. Edwards and Ms. Thomson also challenge the releases on grounds of unconscionability or unequal bargaining power. (*See* Edwards Resp. at 5, 10-11; Russell/Thompson Resp. at 11-12.) However, these charges also fail to rescue their claims from summary judgment. At the outset, none of the cases cited in the response briefs stand for the proposition that a release is only valid if the parties have equal bargaining power. At most, bargaining power has been identified as one of several factors that the courts in Florida look at in determining whether a contract is unconscionable. *See, e.g.*, *VoiceStream Wireless Corp. v. U.S. Comm., Inc.*, 912 So. 2d 34, 39 (Fla. 4th Dist. Ct. App. 2005) ("The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms.") (quoting *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st Dist. Ct. App. 1999)).

In addition, Claimants have not cited facts showing unconscionability. 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). [11] Unconscionability requires extreme facts such as a

[11] 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).

release procured shortly after the death of plaintiff's husband, when she was physically and 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). *See also Steinhardt*, 422 So. 2d at 884-85 (contract at issue negotiated solely by the developer, the developer urged the other parties not to obtain lawyers, and withheld legal papers related to the transaction).

C. The Released Claimants' Failure To Tender Back The Consideration Received In Exchange For Their Releases Precludes Any Attempt To Void, Rescind, Or Otherwise Avoid The Legal Effect Of The Settlements.

Any attempt to void or rescind the effect of the releases based on alleged fraud or other purported inequities must also fail because none of the Released Claimants ever tendered back (or attempted to tender back) the consideration[12] received in exchange for the release. (*See* Liaison Resp. at 20, n. 12.)[13]

This failure bars any attempt to rescind, reform, or otherwise avoid the legal effect of the releases. *See Jackson v. Bellsouth Telecommunications, Inc.*, 181 F. Supp. 2d 1345, 1365 (S.D.

[12] Ms. Edwards contends she "did not personally receive any compensation in consideration of her execution of the release." (Edwards Resp. at 2.) This contention is untenable given that a check in excess of $7,000 was sent to her home and issued in her name. That she may have transferred this check to her physician -- from whom she received thousands of dollars worth of services -- does not change the legal effect of the release. For "[a] promise, no matter how slight, qualifies as consideration if the promisor agrees to do something that he or she is not already obligated to do." *Cintas Corp. No. 2 v. Schwalier*, 901 So. 2d 307, 309 (Fla. 1st Dist. Ct. App. 2005). Thus, consideration "may consist of either a benefit to the promisor or a detriment to the promissee." *Lake Sarasota, Inc. v. Pan Am. Surety Co.*, 140 So. 2d 139, 142 (Fla. 2nd Dist. Ct. App. 1962). "It is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something of value flows from the person to whom it is made, or that he suffers some prejudice or inconvenience and that the promise is the inducement to the transaction." *Id.* Under these formulations of consideration, consideration exists even if the item of value does not flow between the two parties making the contract. *See Texaco, Inc. v. Giltak Corp.*, 492 So. 2d 812, 814 (Fla. 1st Dist. Ct. App. 1986) ("If one, to strengthen the credit of a third person, agrees with a seller to be responsible for goods sold in the future by him to that third person and the seller accepts the agreement, and acts upon it, the agreement is founded on a valid consideration."). *See also In re Eisinger*, 304 B.R. 492, 496 (Bankr. M.D. Fla. 2003) (consideration "may move to the promisor or to a third person" and holding that promissory note signed by debtor and other party was supported by consideration when consideration flowed to debtor's daughter).

[13] "It is axiomatic that fraudulent inducement renders a contract voidable, not void." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000).

Fla. 2001) ("[plaintiffs] cannot now retain the proceeds of the settlement and press a collateral attack on the agreements terms"); *Edmondson v. Dressman*, 469 So.2d 571, 573 (Ala. 1985) ("As a precondition to rescission [of a release based on fraud], the plaintiff must tender a return of the consideration within a reasonable time after the discovery of the fraud.");[14] *see also Bhushan v. Loma Alta Towers Owner's Ass'n, Inc.*, No. 03-00477-CV-C, 2005 WL 2237778 (11th Cir. Sept. 15, 2005) ("'to permit [plaintiff] to retain the money that she got under the release, and to also repudiate same . . . would allow her to divide or separate the transaction by accepting the favorable part and rejecting what was unfavorable to her'") (quoting *Ledbetter v. Frosty Morn Meats*, 150 So. 2d 365, 371 (Ala. 1963)); *Boles v. Blackstock*, 484 So.2d 1077, 1083 (Ala. 1986) ("The plaintiffs, having failed to show that they returned or even tendered a return of the consideration received, are not entitled to proceed with their claim, and, in effect, have waived their right to assert fraud as grounds for rescission of the release.") Acceptance of the settlement, and failure to timely return the proceeds,[15] is fatal to Released Claimants' position.

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[14] Liaison Counsel cites *Taylor v. Dorough*, 547 So. 2d 536, 541 (Ala. 1989) for the proposition that "the Litigation Facility's assertion that the claimants must first return the consideration in connection with the releases is without merit." (*See* Liaison Resp. at 20, n.12.) However, Counsel failed to reveal that ***this case embraces*** the general rule that "a party must return the consideration given for a release as a condition precedent to challenging the release as having been fraudulently obtained," 547 So.2d at 541, but finds the circumstances of that case warranted an exception to this rule because "it would be ***impossible*** for the Taylors to return the money, because they used it to pay Mrs. Taylor's medical providers, who were threatening to foreclose a lien on the Taylors' house." *Id.* (emph. added). None of the Released Claimants have provided any evidence or allegation showing that it would have been "impossible" for them to return the consideration in the ten-plus years that have passed since they retained counsel.

[15] *See also Hinds v. Plantation Pipe Line Co.*, 455 F.2d 902, 906 n.5 (5th Cir. 1972) ("the law of Alabama is clear that as a condition precedent to avoiding a release for fraud, a party is bound to return any valuable consideration therefore ***within a reasonable time*** after the discovery of the alleged fraud") (emph. added). *See also Stefanac v. Cranbrook Educ. Community*, 458 N.W.2d 56, 66 (Mich. 1990) ("We hold as a matter of law that a plaintiff must, in all cases where a legal claim is raised in contravention of an agreement, tender the consideration recited in the agreement prior to or simultaneously with the filing of suit. To allow a grace period for tender after the commencement of a lawsuit would undermine the very rule announced by this court in *Carey* [*v. Levy*, 45 N.W.2d 352 (Mich. 1951)]."). Each Claimant has testified that she had retained counsel with regard to her breast implant

III. CLAIMANTS' DOW CHEMICAL ARGUMENT IS UNAVAILING.

In a last ditch attempt to rescue their claims from summary judgment, Released Claimants now raise potential claims based Dow Chemical's alleged conduct. At the outset, these purported Dow Chemical -related claims do not and cannot provide any basis to overcome summary judgment as to claims based on Dow Corning's conduct. Consequently, regardless of the merits of such claims, the Court should still grant partial summary judgment as to claims against Dow Corning.

Moreover, these dormant and belated claims based on purported Dow Chemical conduct should be viewed with more than an eyebrow of suspicion, as the vast majority of courts to consider the viability of such claims have granted summary judgment or dismissed breast implant claims brought against Dow Chemical. *See, e.g., Artiglio v. Corning Inc.*, 957 P.2d 1313, 1320 (Cal. 1998) (affirming summary judgment for Dow Chemical on negligent undertaking claims); *In re New York State Silicone Breast Implant Litig.*, 227 A.D.2d 310, 310 (N.Y. App. Div. 1996) (affirming summary judgment dismissing all claims pleaded against Dow Chemical).[16]

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claims in ***1993***. (*See* Edwards Aff. ¶ 16; Russell Aff. ¶ 14; Thompson Aff. ¶¶ 15-16.) Attempting to return the proceeds of her settlement over ***one decade*** after retaining counsel fails to comport with the requirement of returning consideration within a reasonable time.

[16] To the extent the Court allows Claimants' Dow Chemical-related claims to proceed, the Litigation Facility reserves the right to move for summary judgment on any appropriate legal or factual basis, including, but not limited to, the running of the statute of limitations and the effect of Plan of Reorganization on such claims.

CONCLUSION

For all of the foregoing reasons, as well as the reasons detailed in the DCC Litigation Facility's opening brief and accompanying affidavit and exhibits, the DCC Litigation Facility respectfully requests the Court enter an order granting its Motion for Summary Judgment and dismissing the claims of Carole Edwards, Diane Russell, and Loisan Thompson.

January 31, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2006, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to the following: Leslie J. Bryan (counsel for Diane Russell and Loisan Thompson) and Fredric L. Ellis and I certify that I have mailed by U.S. Mail the document to the following non-ECF participant: Brenda Fulmer (counsel for Carole Edwards) of Alley Clark Greiwe Fulmer, P.O. Box 3127, Tampa, FL 33601-3127.

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Dated: January 31, 2006