UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

OMNIBUS RESPONSE TO PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION FOR TOLLING OF DISEASE DEFICIENCIES AND REQUEST FOR SIX MONTH EXTESION [SIC] FOR CURING PAST AND FUTURE DISEASE DEFICIENCIES, PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION FOR TOLLING OF DISEASE DEFICIENCIES AND REQUEST FOR SIX MONTH EXTENSION FOR CURING PAST AND FUTURE DISEASE DEFICIENCIES, MOTION AND MEMORANDUM IN SUPPORT OF [REDACTED] AND [REDACTED] TO TOLL THE SIX MONTH DEADLINE FOR CURING RUPTURE DEFICIENCIES, MOTION AND MEMORANDUM IN SUPPORT OF [REDACTED] TO TOLL THE ONE YEAR DEADLINE FOR CURING DISEASE CLAIM DEFICIENCIES, AND MOTION OF NITA BALDWIN TO TOLL THE SIX-MONTH DEADLINE FOR CURING RUPTURE DEFICIENCY

Dow Corning Corporation ("Dow Corning") respectfully submits this OMNIBUS RESPONSE TO PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION FOR TOLLING OF DISEASE DEFICIENCIES AND REQUEST FOR SIX MONTH EXTESION [SIC] FOR CURING PAST AND FUTURE DISEASE DEFICIENCIES ("Klok Motion"), PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION FOR TOLLING OF DISEASE DEFICIENCIES AND REQUEST FOR SIX MONTH EXTENSION FOR CURING PAST AND FUTURE DISEASE DEFICIENCIES ("Steinhaus Motion"); MOTION AND MEMORANDUM IN SUPPORT OF [REDACTED] AND [REDACTED] TO TOLL THE SIX MONTH DEADLINE FOR CURING RUPTURE DEFICIENCIES ("Bryan Motion A"); MOTION AND MEMORANDUM IN SUPPORT OF [REDACTED] TO TOLL THE ONE YEAR DEADLINE FOR CURING DISEASE CLAIM DEFICIENCIES

("Bryan Motion B"), and MOTION OF NITA BALDWIN TO TOLL THE SIX-MONTH DEADLINE FOR CURING RUPTURE DEFICIENCY ("Baldwin Motion"). Any and all filed motions mentioned in this Response are referred to as "Motion(s)."

Background

Since May 26, 2005, various claimants have filed five separate Motions seeking extensions of time to cure deficiencies in claim filings or, alternatively, a "tolling" of the Plan's cure deadlines. All of these Motions complain about either the timing of the claims-processing function of the Settlement Facility-Dow Corning Trust ("SF-DCT") or about the substantive standards applied by the SF-DCT in evaluating claims. Several of these Motions also seek extensive disclosure of processing criteria and guidelines including the determinations of the SF-DCT regarding the reliability of records of certain medical doctors. Some of the Motions purport to request relief on behalf of all claimants who have filed certain types of claims to date; other Motions focus on the specific facts and circumstances of individual claimants. All of the Motions raise issues identical to those raised in certain Motions filed in late 2004 and early 2005 that remain pending before the Court.

Although each Motion presents unique claimant-specific facts, the allegations upon which the requests for relief are based fall into one or more of the four following categories: (1) allegations that the SF-DCT has not employed the correct processing

standards consistent with the standards of the MDL 926 claims office resulting in confusion among claimants and difficulties in presenting appropriate medical information to support the claims; (2) allegations that the SF-DCT has not provided sufficient information regarding the acceptability of particular medical records to enable the claimant to timely cure deficiencies; (3) allegations that the SF-DCT has not provided sufficient information regarding the particular deficiency or has issued various conflicting or at least different Notification of Status letters regarding the same initial claim submission so that the claimant was not timely informed of all the deficiencies and thus could not effect a cure in a reasonable amount of time; and (4) allegations that the SF-DCT has not processed claims, requests for review of supplemental information, or requests for appeals with sufficient speed to allow for additional efforts to cure deficiencies before the claimant's cure deadline expires.

The history of all the currently pending motions is outlined below:

1. On December 15, 2004 the Claimants' Advisory Committee ("CAC") filed its *Motion of the Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration* (the "CAC Motion"), seeking disclosure of all guidelines and procedures applied by the SF-DCT and an extension of time to cure deficiencies based on purportedly incorrect or inconsistent standards.

2. On January 7, 2005 Dawn Barrios, on behalf of "Settlement Facility Disability A Claimants," filed the *Motion and Brief Adopting The Motion of the Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration* (the "Barrios Motion") (together with the CAC Motion, the "CAC Motions"). The Barrios Motion adopts the request of the CAC Motion and, in addition, asks the Court to review the criteria used by the SF-DCT to determine entitlement to a Level A disability claim to "ensure" that the proper criteria are applied.

3. Dow Corning filed a Response to the CAC Motions on January 21, 2005 (the "Dow Corning Response").

4. On January 21, 2005 Leslie J. Bryan filed *Motion of [Redacted] to Toll the Six Month Deadline for Curing Rupture Deficiencies* ("Doffermyre Motion to Toll") seeking an extension of the cure deadlines based on delays in claim processing.

5. On February 7, 2005 the CAC filed a Reply to the Dow Corning Response ("CAC Reply") which was joined in and adopted by Dawn Barrios on behalf of the "Spitzfaden Claimants" (the "Barrios Reply").

6. On February 7, 2005 the CAC jointly filed a Response the Doffermyre Motion to Toll ("CAC Response to Doffermyre") and a *Motion of the Claimants' Advisory Committee to Toll the Cure Deadline For All Requests for Re-Review That Are Pending More*

Than 21 Days ("CAC Motion for Re-Review") seeking an extension of the cure deadlines based on the delayed processing of claims.

7. On February 25, 2005 Richard DeSanto filed the *Motion of Deborah DeSanto For a 60 Day Extension to Cure Her Explant and Rupture Deficiencies Based on Special Circumstances* ("DeSanto Motion"). The DeSanto Motion joins in the CAC Motion and the Doffermyre Motion to Toll and, in addition, seeks an extension of time to cure deficiencies due to the Florida hurricanes.

8. On March 16, 2005 Robert D. Steinhaus filed the *Motion of Tamara Vanlandingham to Toll the Six Month Deadline for Curing Rupture Deficiencies* ("Vanlandingham Motion to Toll"), seeking to extend the cure deadlines due to the slow processing of claims by the SF-DCT.

9. On March 18, 2005 Dow Corning filed the Response to the Doffermyre Motion to Toll, the CAC Motion for Re-Review, and the DeSanto Motion (collectively, "Response to Tolling Motions").

10. On April 5, 2005 Dow Corning sought leave to file a Sur-Reply to the CAC Reply. *See* Dow Corning's *Motion For Leave To File Sur-Reply In Further Response To Motion Of Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration And To Motion And Brief Adopting The Motion Of The Claimants' Advisory*

Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration ("Dow Corning's Motion for Leave to File Sur-Reply"), attached hereto as Exhibit A. The Court neither granted nor denied Dow Corning's Motion.

11. On April 8, 2005 Dow Corning filed the Response to the Vanlandingham Motion to Toll.

12. On May 27, 2005 Rhett D. Klok filed *Plaintiffs' Motion For Expedited Consideration For Tolling Of Disease Deficiencies And Request For Six Month Extesion* [sic] *For Curing Past And Future Deficiencies* (the "Klok Motion"). The Klok Motion joins in and adopts the CAC Motion and, additionally, seeks an extension of the cure deadlines based on perceived errors or inconsistencies in standards for Qualified Medical Doctors ("QMDs") and unclear or inconsistent Notification of Status letters.

13. On May 31, 2005 Robert D. Steinhaus filed *Plaintiffs' Motion For Expedited Consideration For Tolling Of Disease Deficiencies And Request For Six Month Extension For Curing Past And Future Deficiencies* (the "Steinhaus Motion"). The Steinhaus Motion joins in and adopts the Klok Motion and the CAC Motion and further seeks an extension of the cure deadlines for claimants who received different or conflicting Notification of Status letters.

14. On June 6, 2005 two Motions entitled *Motion and Memorandum In Support Of [Redacted] To Toll the One Year Deadline For Curing Disease Claim Deficiencies* were filed by Leslie J. Bryan on behalf of two disease claimants ("Bryan Motion A" and "Bryan Motion C"). These Motions join in the Klok Motion and seek to toll the disease claim cure deadlines with respect to the two individual claimants pending resolution of their appeals and resolution of the CAC Motions, based on the slow processing of their claims by the SF-DCT.

15. On June 6, 2005 the *Motion and Memorandum In Support Of [Redacted] And [Redacted] To Toll the Six Month Deadline For Curing Rupture Deficiencies* was filed by Leslie J. Bryan on behalf of two rupture claimants ("Bryan Motion B") and similarly situated claimants, seeking to toll their rupture cure deadlines pending completion of the appeals process, based on the slow processing of their claims.

16. On June 10, 2005 Leslie J. Bryan filed a *Withdrawal of Motion and Memorandum In Support Of [Redacted] To Toll the One Year Deadline For Curing Disease Claim Deficiencies*, withdrawing Bryan Motion C since the claimant's claim was approved prior to her cure deadline.

17. On June 10, 2005 Thomas R. Dreiling served the *Motion of Nita Baldwin to Toll the Six-Month Deadline for Curing Rupture Deficiencies* ("Baldwin Motion") on behalf of claimant Nita Baldwin, and similarly situated claimants, seeking an extension of the

cure deadline based on the delayed processing of her claim. This Motion joins in the CAC Motion, Bryan Motion A, and Bryan Motion B, as well as the DeSanto Motion and Vanlandingham Motion, and "other pending motions before the Court regarding cure deadlines." (Collectively, the "Klok Motion," the "Steinhaus Motion," "Bryan Motion A," "Bryan Motion B," and the "Baldwin Motion" are referred to as the "Plaintiffs' Motions.")

Summary

The movants seek, as noted: (1) disclosure of all the guidelines and procedures applied by the SF-DCT to evaluate individual claims and (2) extensions or tolling of the deadlines to cure deficiencies.[1] The various movants assert that this "relief" is necessary to address what they obviously perceive as errors and delays in some aspect of the claims-processing operations of the SF-DCT. In some cases, the movants have provided

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[1] Dow Corning incorporates herein its prior responses to the various Motions seeking disclosure of Settlement Facility guidelines and tolling or extension of cure deadlines, specifically: Dow Corning's *Response to Motion of the Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration and Response to Motion and Brief Adopting The Motion of the Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration* ("Response to CAC Motions") (Filed January 21, 2005); *Motion for Leave to File Sur-Reply in Further Response to Motion of Claimants' Advisory Committee for The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration to Motion and Brief Adopting The Motion of the Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration* ("Dow Corning's Sur-Reply") (Filed April 5, 2005); *Response to Motion of [Redacted] to Toll the Six Month Deadline for Curing Rupture Deficiencies, Motion of the Claimants' Advisory Committee to Toll the Cure Deadline For All Requests for Re-Review That Are Pending More Than 21 Days, and Motion of Deborah DeSanto For a 60 Day Extension to Cure Her Explant and Rupture Deficiencies Based on Special Circumstances* ("Response to Tolling Motions") (Filed March 18, 2005); *Response to Motion of Tamara Vanlandingham to Toll the Six Month Deadline for Curing Rupture Deficiencies* ("Response to Vanlandingham Motion") (Filed April 7, 2005). (Collectively, Dow Corning's Responses to Prior Motions.)

a "history" of an individual claimant's experience in the SF-DCT. Other movants make bald assertions that the review process is "overly harsh" or different from the MDL. None of the movants explains how disclosure of processing criteria or extensions of time will resolve the issues that they claim led to the need to make these requests.

As explained more fully below, Dow Corning firmly supports the position that the Plan must be implemented as negotiated and as intended. However, it is important to note the import and impact of the process suggested by these Motions. By requesting disclosure of guidelines and procedures, the movants are setting the stage for what could become extensive and contentious litigation, involving possibly hundreds of lawyers, over the detailed processing guidelines used by the SF-DCT and the application of those guidelines to detailed, individual claimant medical records. Indeed, the individual Motions contain selected records and information from claimant files, presumably as "illustrations" of the alleged infirmities in the claims office. While Dow Corning is committed to assuring the proper implementation of the Plan and does not object to procedures to assure that claimants are fairly informed, piecemeal litigation over the interpretation, development and application of claim evaluation criteria is inappropriate and impermissible under the Plan. The Plan establishes the SF-DCT as the entity with the obligation and authority to resolve all Settling Personal Injury Claims. Under the Settlement Facility and Fund Distribution Agreement

("Settlement Facility Agreement"), the SF-DCT is to evaluate each claim in accordance with the detailed guidelines specified in the Plan. Any claimant who disagrees with the decision of the SF-DCT may appeal that decision to the Appeals Judge. The appeals process envisions that the Appeals Judge will review the application of the Plan's guidelines to the particular claim. The Plan expressly prohibits the Claims Administrator and the Appeals Judge from developing new or revising previous interpretations of the Plan criteria. *See* Settlement Facility Agreement § 5.05 and Annex A § 8.05. There is no right of appeal beyond the determination of the Appeals Judge. The Plan thus was expressly intended to prevent litigation over both the proper evaluation of each individual claim and the development and interpretation of claims-processing criteria. Indeed, if litigation over individual claim decisions and challenges to the claims evaluation criteria were permitted, then every single claimant who is dissatisfied with the decision of the claims office will appeal to this Court. Rather than having an efficient administrative procedure for resolving claims, this Court and the parties would become embroiled in detailed litigation over perhaps thousands of individual claims.

The Plan structure, i.e., the delegation of claims evaluation decisions to the SF-DCT and the prohibition on appeals to the Court, is essential to an effective and fair resolution of all settling tort claims. The process of piecemeal litigation of claimant-

specific issues would most likely result in inconsistent treatment of claimants, depending on the quality of the claimant's advocacy. One of the key benefits of a uniform claims-processing system employing objective guidelines is to avoid inequities among claimants. The examples cited in these individual Motions underscore the inadvisability of such litigation: the Klok Motion, for example, argues about the sufficiency of a certain doctor's report opining that the claimant at issue satisfies the Disability Level B requirements. The SF-DCT found that submission insufficient and requested additional supporting documentation. The movant seems to assert that the request for additional documentation does not comport with the Plan's requirements that the SF-DCT follow MDL guidelines (at least to an extent). In order for the Court to address this argument, the Court would have to investigate the MDL guidelines and determine whether the Plan intended the adoption of that particular MDL guideline. Then, the Court would have to review the medical documents and determine whether the claim satisfies the standards. If the Court disagrees with the claimant, then the claimant might seek to appeal to the Sixth Circuit, and, if the Court's decision differs from the standards applied by the SF-DCT, then potentially thousands of claimants would then challenge their claim evaluations.

Nevertheless, as noted, Dow Corning recognizes the importance of the substantive issues raised by the various movants. The Plan Proponents negotiated a

very detailed and specific set of guidelines governing settling tort claims. It is critically important that those guidelines be applied as intended. Indeed, the Plan's requirement that the Claims Administrator present Plan interpretation questions to the CAC and the Debtor's Representatives was intended specifically to avoid potential misinterpretations or misapplication of the claim resolution requirements. As the Court knows, the Debtor's Representatives and CAC requested in the Fall of 2004 that the SF-DCT commission an independent review of management and operational systems as well as an audit of processed claims. The purpose of these procedures was to ensure that the SF-DCT was operating as efficiently and effectively as reasonably possible and to assure that the SF-DCT was applying the appropriate evaluation guidelines as contemplated by the Plan. The management review was completed in February 2005. The review resulted in certain recommendations that would improve the operation of the SF-DCT and save administrative costs. The claims audit was conducted during April and May of 2005 and the auditor has supplied a report to the Finance Committee only in the last week. This report will require some study and it is quite likely that there will be a need for some additional analysis and review. Dow Corning agrees that it may be necessary to revisit certain claims depending on the outcome of the claims audit review. If, for example, upon completion of the claims audit review it is determined that the Plan

criteria have been improperly or inconsistently applied, Dow Corning agrees that any affected claims should be re-evaluated without prejudice.

Dow Corning agrees that it is essential to assure that the SF-DCT properly applies the criteria established by the Plan for resolving settling tort claims. Dow Corning believes that the only feasible way to assure adherence to the requirements is to request that the new Claims Administrator develop a process for any additional audit or evaluation that he deems necessary to evaluate the allegations raised by the Motions and to ensure that Plan requirements are being followed. Dow Corning suggests that the Claims Administrator should report his conclusions and findings (including any determination that all issues have been adequately investigated in the existing audit) to the Court, and to the CAC and the Debtor's Representatives.[2] It is impossible to proceed in any other way: to determine the accuracy of the claims-processing guidelines, one must review not only the processing manuals used by the SF-DCT, but also the MDL guidelines and practices and the procedures for interpreting and examples of the interpretation of individual medical records. Indeed, a full analysis might require the submission of a sample of individual claims to the MDL claims office to determine consistency of evaluation.

[2] The Plan imbues the Debtor's Representatives and the CAC with authority to take actions to enforce the obligations in the Plan. Settlement Facility Agreement § 4.09(c)(v).

Dow Corning addresses the various specific assertions and demands of the movants in more detail below. For the reasons articulated herein, the various Motions should be denied or deferred.

Argument

Many of the Plaintiffs' Motions have simply copied the arguments and assertions in Motions filed earlier, and several of the Motions (the Klok Motion, Steinhaus Motion, Baldwin Motion, and Bryan Motion A) incorporate the exact same request for relief, regardless of the particular circumstances of the claims at issue. For purposes of this Response, Dow Corning has categorized the arguments and responds jointly to the various Motions.

A. Motions Asserting That The Plan Criteria Are Not Being Applied Correctly Cannot Be Addressed through Piecemeal Motions Practice Or Litigation Regarding Particular Detailed Evaluation Criteria.

Certain movants assert that the SF-DCT is not applying the claims evaluation criteria correctly. *See* Klok Motion at 10-11; Steinhaus Motion at 2, 5; and Bryan Motion A at 1, 3-4. These movants raise essentially two points: first, that the SF-DCT is being "overly harsh" (Bryan Motion A at 3) in the evaluation of disease claims and, second, that the SF-DCT has misinterpreted or unilaterally changed the Disability Level A criteria for Disease Option I claims.[3] *See* Klok Motion at 10; Steinhaus Motion at 2, 5;

[3] One movant asserts that the claimants are entitled to rely on their original 1994 MDL submissions to support their claims. See Klok Motion at 4. It is not clear whether that movant is asserting that the SF-DCT is not in fact permitting such reliance and the Klok Motion does not suggest any particular "remedy." However, while the Plan does permit

and Bryan Motion A at 1, 3-4. It is impossible to respond to an assertion that the claims evaluation is "overly harsh." What exactly does that mean? An evaluation process can only be "overly harsh" with reference to a particular standard.[4]These movants request, as relief for the assertion of "overly harsh" evaluation or misinterpretation of Disease Level A, the disclosure of "all processing applications that impact or purport to change the settlement benefit criteria." Klok Motion at 15; Steinhaus Motion at 5. *See also* Bryan Motion A at 4. This request is on its face over-broad and, frankly, impossible to implement. Literally, this request could, if granted, require the SF-DCT to disclose interpretations of each and every medical record submitted to the SF-DCT. As articulated in more detail in Dow Corning's Responses to Prior Motions, such disclosure would not only have the effect of chilling the operations of the SF-DCT, it would likely generate litigation over the meaning of terms and phrases in thousands of individual claimant records.[5]

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such reliance, it does not guarantee that in all cases the MDL submissions will be sufficient to support the claim. As one simple example, the original MDL submission may have been found deficient. Or, the claimants may have subsequent medical records that negate a finding of the MDL claims office.

[4] One interpretation of this "statement" is that this is meant to assert that the SF-DCT is not processing claims in the same manner as the MDL 926 claims office. It is important to clarify that the Plan does not require the SF-DCT to follow the MDL process in all respects and at all times. The SF-DCT is mandated to apply the MDL criteria to the extent that the Plan does not specify alternative criteria. However, the SF-DCT is authorized to apply the criteria in effect as of February 2003 when claim forms were mailed. *See* Settlement Facility Agreement § 4.03(a) and Annex A § 7.01(a). Thus, the SF-DCT need not apply the criteria in existence in 1996, and to the extent that claimants perceive some differences, they could be attributable to this "timing" issue.

[5] *See* Dow Corning Response at 10-12. *See also* Dow Corning's Motion for Leave to File Sur-Reply, Exhibit 1 at 3, 7-8.

As noted above, all parties want assurance that the criteria specified in the Plan are implemented as intended. Disclosure of all claims-processing guidelines will not achieve that result. Rather, the only sensible and realistic solution is to rely on the new Claims Administrator to complete the audit procedures and implement ongoing audit processes to assure that claims are evaluated correctly.

The challenge to the application of the Disability Level A standard – raised both in the earlier Motions filed by the CAC and by certain Spitzfaden claimants, and now by the Klok Motion, raises an additional issue. These Motions assert that either the SF-DCT has somehow changed the Disability Level A standard or that the standard was incorrectly interpreted by Judge Pointer in the MDL. *See* Klok Motion at 10. To the extent the Klok Motion argues that Judge Pointer's ruling "changed" the Disability Level A standard and that if the SF-DCT is relying on that interpretation, it is applying a criterion that "contradicts" the Plan language, Dow Corning must disagree. Judge Pointer's articulation of the Disability Level A standard over seven years ago (in 1997) was a reasonable interpretation of the MDL Disability language, which was incorporated without modification into the Plan.[6] Both Judge Pointer's decision and

[6] The Plaintiffs wrongly assert that both Plan Proponents had no idea that the Disability Level A language had been "interpreted and modified by Judge Pointer," citing to a November 19, 2001 memorandum from Deborah Greenspan to E. Wendy Trachte-Huber stating that "We do not believe that Judge Pointer issued an order changing the wording of the disability guideline." Klok Motion at 10 (quoting Klok Motion, Exhibit 20, Memorandum dated November 19, 2001 from D. Greenspan to E. Wendy Trachte-Huber). That memorandum responded to a question about whether Judge Pointer changed the **language** of the standard for Disability Level A. Importantly, while the memo expressed the belief that Judge Pointer did not alter "the **wording** of the disability guideline," it further provided that whatever

various communications from the SF-DCT indicate that there are additional interpretations of the Disability Level A standard by the MDL 926 claims office. The Plan specifies that the SF-DCT claims office shall "operate using the claims-processing procedures and quality control process applied by the Initial MDL Claims Administrator." Settlement Facility Agreement at § 4.03(a). The Plan further authorizes the SF-DCT to rely on the MDL procedures existing as of February 2003. *Id.* Accordingly, the SF-DCT must apply the Disability Level A standard applied by the MDL claims office. Thus, if the MDL claims office applied the standard articulated in Judge Pointer's decision, then the SF-DCT must apply that same standard.

As noted in earlier pleadings, it appears that the SF-DCT sent Notification of Status letters that, at best, offered a confusing explanation of the Disability Level A standard. *See* Dow Corning Response at 2. *See also* Dow Corning's Motion for Leave to File Sur-Reply, Exhibit 1 at 2, 4-5. For this reason, Dow Corning has previously indicated, and reiterates herein, that it does not object to a clearer and more prominent

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interpretations Judge Pointer or the MDL claims office had made would apply to the SF-DCT. What was true three years ago remains true today: Judge Pointer did not change or modify the **wording** of the standard but only issued a ruling providing the appropriate interpretation of that standard. The issue of Judge Pointer's interpretation has been briefed and presented to the MDL Court. Dow Corning refers the Court to the *RSP Defendants' Memorandum In Opposition To Plaintiffs' Motion For Disclosure of Substantive Criteria Adopted And/Or Being Applied By the MDL Claims Office* (the "RSP Memorandum"), which is attached to Dow Corning's Motion for Leave to File Sur-Reply as Exhibit A to Exhibit 1. *See* Exhibit A hereto. That pleading explains that Judge Pointer's ruling did not "change" any rule but rather expressed a reasonable interpretation of the Plan language in full accord with the basic points of grammar and was not "secret." RSP Memorandum at 2.

disclosure of the already public interpretation of the Disability Level A standard to alleviate any misunderstanding of the standard.

B. Demands That The SF-DCT Disclose Lists Of "Unreliable" Doctors Is Unnecessary And Must Be Denied.

Dow Corning objects to efforts to require the SF-DCT to disclose the results of its evaluation of the reliability of medical evidence by publishing lists of doctors whose reports have at one time or another been deemed unreliable by the SF-DCT. First, such public disclosure of doctors' names would be inappropriate; it could have a detrimental effect on the doctors themselves and the patients' relationships with the doctors, and it could subject the SF-DCT to lawsuits. Second, the SF-DCT has the obligation to assure the reliability of medical evidence supporting claim submissions. To that end, the SF-DCT must make judgments on a daily basis regarding the veracity, validity, reliability and appropriateness of medical documents, and the conclusions reached by the SF-DCT may change over time. Dow Corning understands that the SF-DCT has instituted a policy whereby a claimant may contact the Claims Assistance Program to ascertain whether a particular doctor's reports are currently considered reliable by the SF-DCT. This policy should address the legitimate concern of claimants that they avoid seeking medical documentation from doctors whose reports are considered unreliable by the SF-DCT.

C. Argument That QMDs Are Not Adequately Defined Is Without Merit.

One movant asserts that the term Qualified Medical Doctor ("QMD") "is currently not defined" in the Plan and asks the Court to require "a precise definition." Klok Motion at 1, 11-14. Dow Corning does not understand this assertion. The Plan defines QMD as "a physician who is Board-certified (not Board eligible) in internal medicine, rheumatology (a sub-specialty of internal medicine), neurology, neurological surgery, or immunology... ." Annex A, Schedule II, Part A. The Plan provides that a physician "must be Board-certified in an appropriate specialty," and that "[t]he type of specialty depends on the complaints and symptoms with which a Claimant presents." Annex A, Schedule II, Part A. In other words, the physician must specialize in an area related to the conditions of a particular claimant. For example, the SF-DCT might reject a purported "QMD diagnosis" where a claimant submitted the medical report of a neurologist in an effort to diagnose pulmonary function.

Dow Corning does not entirely understand the argument asserted in the Klok Motion. However, the Plan specifically defines QMD, and any claim-specific questions should be addressed to the Claims Assistance Program on a case-by-case basis.

D. The Wholesale Extension Of Cure Deadlines Is Inappropriate And Impermissible Under The Plan; Requests To Extend Time Due To Allegation Of Errors In Processing Must Be Denied.

Dow Corning believes that claimants must be afforded the full benefit of their six month (for rupture claimants) or one-year (for disease claimants) cure period. *See* Annex A § 7.09(c)(ii) and Annex A § 7.09(b)(ii). At the same time, these Plan-mandated deadlines are an important component of the claims resolution process and they are not discretionary. Indeed, any blanket extension would constitute an impermissible Plan modification. Accordingly, any request for a wholesale extension or modification of deadlines must be denied.

Movants assert three basic reasons for an extension of deadlines: First, some claimants appear to believe that they are entitled to unlimited opportunities to cure deficiencies. Thus, they essentially seek an extension of time to enable them to respond to any Notification of Status letter. Second, some claimants contend that the claims procedures are in error, that the evaluation criteria applied were incorrect. Third, some claimants argue that the Notification of Status letters have provided misleading or incorrect statements of deficiencies. As explained in previous pleadings,[7] to the extent the basis for any extension rests on a belief that a claimant has a right to unlimited attempts to cure deficiencies, an extension is unwarranted and is impermissible under

[7] *See* Dow Corning's Response to Doffermyre Motion to Toll, to CAC Motion for Re-Review and to DeSantos Motion at 3; Response to Vanlandingham Motion at 6-7.

the Plan. Requests to extend deadlines based on the assertion that the SF-DCT applied incorrect criteria must be deferred pending the outcome of the audit review discussed above.

Certain movants contend that the deadlines should be extended because the SF-DCT failed to timely or adequately inform the claimant of the deficiency. They contend that the SF-DCT does not adequately identify the reasons for deficiencies in the Notification of Status letters. *See* Klok Motion at 6 and Steinhaus Motion at 3-5. To support this contention, movants cite two examples of claimants who allegedly took "exhaustive steps" to cure their deficiencies but were deemed ineligible for reasons that were, they claim, not adequately disclosed to the claimants. They argue that the SF-DCT's alleged failure to disclose the reasons why a claim was not approved violates the requirements set forth under the Plan and, therefore, they request a six-month extension for curing "all past and all future deficiencies"[8] or a process by which all deficient claims are placed on Administrative Hold.[9] Klok Motion at 15; Steinhaus Motion at 5.

The Steinhaus claimants also contend that the SF-DCT has issued multiple inconsistent Notification of Status letters, including supplemental letters that identify

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[8] The relief the Plaintiffs seek is not entirely clear. They alternatively request a six-month extension to cure "all past and all *future* deficiencies," *see* Klok Motion at 15, Steinhaus Motion at 5, or to cure "all past and all *present* deficiencies," *see* Klok Motion at 2, Steinhaus Motion at 1 (emphasis added).

[9] The SF-DCT adopted the use of Administrative "Hold" as a temporary measure to afford it additional time to crystallize its policy regarding QMD reliability.

deficiencies that were not identified in the original Notification of Status letter even though the bases of the deficiencies were included with the original submission. As a result, the movants argue that the claimants' have not received the benefit of the cure period allowed in the Plan.[10] *See* Steinhaus Motion at 3. Plaintiffs therefore seek to toll the deadline to cure deficiencies for "any claimants whose claims are found deficient based on criteria they were not informed about." Steinhaus Motion at 15.

The relief requested by the Steinhaus Motion and the Klok Motion is overly broad and impossible to implement. This demand for a blanket extension of all cure deadlines in violation of the Plan must therefore be denied. Requiring the wholesale extension of deadlines for all claimants without regard to the legitimacy of the claimant's complaint or the actions of the SF-DCT will effectively eviscerate the deadlines and undermine the integrity of the Plan and would constitute an unauthorized Plan modification. The relief requested would simply extend all deadlines without regard to whether the claimant received inconsistent or incomplete information from the SF-DCT. Indeed, since only three incidents are cited by Plaintiffs'

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[10] As an example, Plaintiffs cite the experience of one claimant who made multiple submissions to the SF-DCT to cure her deficiencies. According to Plaintiffs, her third Notification of Status letter identified a deficiency – headaches – that had never before been identified despite the fact that her physician had mentioned headaches in a report included with her initial submission. Since many of the documents Plaintiffs rely on and submit as exhibits to the Steinhaus Motion are completely illegible, Dow Corning is in no position to refute these assertions on a factual basis. However, as Plaintiffs themselves concede, this error was harmless since the claimant was nevertheless approved for Level C compensation. *See* Steinhaus Motion at 4.

counsel, we have no reason to believe that these experiences are universal or occur with any sort of regularity such that they warrant such broad-based relief.

Nevertheless, Dow Corning believes that claimants must be informed of any deficiencies in a complete and timely manner. To that end, Dow Corning recognizes that extension or tolling of the cure deadlines may be warranted on a case-by-case basis. Dow Corning further believes that the Claims Administrator must determine how best and fairly to communicate information about deficiencies – in Notification of Status letters and through other communications with claimants. For instance, where the SF-DCT issues a second or third Notification of Status letter that identifies a deficiency for the first time, even though the documentation on which that deficiency was based was submitted with the claimant's earlier submission, Dow Corning would agree to allow the cure deadline to run from the date of the complete and accurate final Notification of Status letter based on the initial submission. Likewise, where the SF-DCT reviewed the same material several times but came to different conclusions and issued multiple Notification of Status letters reflecting these inconsistent conclusions,[11] Dow Corning would agree to toll the cure deadline pending clarification from the SF-DCT as to which

[11] It has recently been brought to our attention that, in some cases, where a Quality Assurance review reveals deficiencies that were not previously identified by the SF-DCT staff in preparing the initial Notification of Status letter, a second Notification of Status letter may have been issued that "corrects" the initial letter without changing the cure deadline. If in fact this practice exists, Dow Corning believes that a claimant's period to cure would be unfairly limited and, as such, the cure deadline should run from the date of the second, corrected Notification of Status letter, rather than from the date of the initial letter.

letter accurately states the deficiencies. In Dow Corning's view, the claimant's cure period should not be reduced as a result of an incorrect communication from the SF-DCT and in such instances Dow Corning agrees that an extension is appropriate. (Indeed, without the extension, the claimant would not receive the benefit of the Plan-mandated cure provision.) The Claims Administrator must evaluate all claims to determine whether incorrect or contradictory Notification of Status letters were provided and adjust the deadline accordingly. On the other hand, where a claimant raises a new issue in her supplemental submission, which gives rise to a new deficiency, it is unreasonable for claimants to expect additional time to cure the deficiencies, and no tolling or extension can be permitted.

Dow Corning understands that some claimants are confused by the wording of the Notification of Status letters. In such event, it was Dow Corning's understanding that the claimants could speak to the Claims Assistance Program to get a detailed explanation of the deficiency and what is required to cure the deficiency. In addition, the new Claims Administrator is currently reviewing the Notification of Status letters and will likely be revising the language of the letters in the near future. This should help avoid similar confusion in the future.

In sum, Dow Corning believes it is appropriate and fair to start the deadline for curing deficiencies from the date of the first letter that fully lists all deficiencies found in

the initial claim submission so that the claimant receives the full cure period mandated by the Plan. Additionally, Dow Corning agrees that, to the extent a claimant is unable to comply with a deadline due to an error by the SF-DCT, for example, if the Notification of Status letter is sent to the wrong address, then the Claims Administrator should have the ability to start the deadline when the letter is sent to the right address. Requests to modify the Plan by extending all deadlines for all claimants violate the Plan and cannot be granted.

E. The Tolling Of The Cure Deadlines Pending Resolution Of Appeals Or Individual Review Process ("IRP") Review Is Unnecessary And Inappropriate.

Certain movants assert that delays in the appeals process may jeopardize their ability to qualify for compensation under the Plan since their cure deadlines have expired or are close to expiring without decision from the IRP review or the appeals judge. *See* Bryan Motion A at 3-4; Bryan Motion B at 4-5; Baldwin Motion at 3-4. Plaintiffs therefore seek to toll the cure deadlines pending completion of the appeals process.

It appears that the rupture claimant in the Baldwin Motion believes that she is somehow prejudiced by having to wait for the conclusion of the IRP before appealing. In fact, the claimant misunderstands the Plan. The Plan expressly provides that an appeal of the Claims Administrator's decision can and should occur simultaneously

with the review under the IRP. *See* Annex A § 6.02(e)(vi)(d). The purpose of this provision was to allow claimants to proceed with the correction of deficiencies through the appeals process while seeking an alternative means of qualifying for a rupture payment under the IRP. The Plan expressly provides this parallel track so that rupture claimants will not inadvertently miss the cure deadline. While the Plan allows an appeal of the IRP decision to the Appeals Judge, *see* Annex A § 6.02(e)(vi)(c), the Plan does *not* provide for any extension or tolling of cure deadlines pending IRP review. Had it so provided, all claimants could submit their claims to the IRP as a way to "buy" more time.

Indeed, although Ms. Baldwin claims to have filed a request for participation in the IRP in January 2005, a review of the Exhibits demonstrates that the IRP request was made only in the last week. *See* Baldwin Motion at 3, Exhibit G. Thus, there is some confusion regarding the procedural history of this claim. However, regardless of when she filed the IRP request, it appears that Ms. Baldwin did not submit a simultaneous appeal. Moreover, according to her own Motion, Baldwin did not make any effort to supplement her claim or contact the SF-DCT until *10 days* before the cure deadline was set to expire. This claimant had ample time to proceed with an appeal. There is no justification for any extension of time.

Similarly, it appears that the rupture claimants in Bryan Motion B and the disease claimants in Bryan Motion A believe that they are somehow prejudiced by having to wait for the Appeals Judge to issue a determination. Yet, it is not exactly clear how they would be prejudiced or even what "relief" they are seeking. To the extent that the claimants are requesting that a claim be considered timely cured if an Appeals Judge determines *after* the cure deadline that a claimant's submission satisfies the applicable criteria, Dow Corning agrees. However, to the extent that Plaintiffs request another opportunity to cure if an appeals judge determines, after the claimants' cure deadline, that the claim is deficient, Dow Corning strongly objects. There is nothing in the Plan or the Claims Resolution Procedures (Annex A to the Settlement Facility Agreement) that grants claimants a right to supplement their claim after the final appeal. The claimant has six months (in the case of rupture) and one year (in the case of disease) from the date of the Notification of Status letter to submit additional information in response to a deficiency. The Appeals Judge is authorized to determine whether the claims office properly applied the criteria in evaluating the claim. The Appeals Judge does not conduct a new review to determine whether there are other deficiencies not addressed by the Notification of Status letter. There is absolutely no basis to permit claimants to go back to the claims office to "try again" after completing the appeals process, and the Plan does not permit such "unending" review.

F. The SF-DCT Does Not Have Authority To Extend Deadlines Ad Hoc.

It appears that the SF-DCT has unilaterally extended the cure deadlines on an ad hoc basis for some claimants. *See* Bryan Motion B at 2-4, Baldwin Motion at 3. The SF-DCT does not have authority to amend deadlines in this manner. The ad hoc extension of time is not authorized by the Plan and such a practice has the potential to create inequities among claimants. Dow Corning objects to any assertion of authority by the SF-DCT to amend deadlines for individual claimants except under the circumstances cited in Section D above or alternatively, perhaps for a case of extreme hardship, such as a serious illness or disability that prevented the claimant from seeking the necessary additional medical evaluations.

Conclusion

The relief requested by the various Motions is overbroad and impermissible under the Plan and must be denied. Requiring the SF-DCT to disclose its internal claims-processing criteria, guidelines and decisions applying the Plan criteria to individual medical records violates the fundamental premise and structure of the settlement process. Such broad-based disclosure would significantly delay, if not totally halt, the processing of claims and would generate litigation over the proper interpretation of detailed criteria in potentially each individual claim. In short, the wholesale disclosure the movants seek would completely undermine the efficiency and

integrity of the claims administrative process. The issues regarding the SF-DCT's adherence to correct processing criteria must be referred to the Claims Administrator and to an audit process.

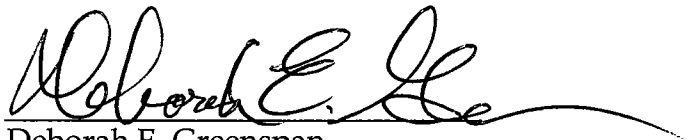
Similarly, the "blanket" extensions of deadlines requested – based variously on disagreements over claims evaluation guidelines, delays in the processing of claims and a misunderstanding of the cure process – must also be denied. Dow Corning agrees that fundamental fairness and a correct interpretation of the Plan supports the extension of deadlines under limited circumstances to account for incorrect or conflicting Notification of Status letters sent by the SF-DCT so that claimants receive the cure period required by the Plan.

For these reasons and the reasons stated above, the request of the Klok Motion for the wholesale disclosure of the guidelines and procedures of the SF-DCT and lists of qualified medical doctors, and the blanket extension or tolling of cure deadlines, regardless of the particular circumstances of the claims at issue must be denied. To the extent the Steinhaus Motion, Bryan Motion A, and the Baldwin Motion adopt these requests, those motions too must be denied. To the extent the request of the Klok Motion seeks to determine whether the SF-DCT is properly and consistently applying the Plan criteria to individual claims, and to the extent the Steinhaus Motion, Bryan Motion A, and the Baldwin Motion join in this request, Dow Corning recommends that

a hearing on these motions be deferred until the conclusion of a full claims process audit and the development of an action plan or proposal by the new Claims Administrator. To the extent Bryan Motion A and Bryan Motion B seek an additional opportunity to cure deficiencies after the Appeals Judge has issued his decision, the Motions must be denied. To the extent the Baldwin Motion seeks an extension of her cure deadline pending IRP review, it must be denied. We further recommend that the Claims Administrator submit a proposal to the CAC, Debtor's Representatives, and the Court for addressing the various issues raised by these motions since many of them result from the processing claim flow set up by the SF-DCT.

Respectfully submitted this 20th day of June 2005,

DICKSTEIN SHAPIRO MORIN & OSHINSKY, LLP

By: 

Deborah E. Greenspan
2101 L Street, N.W.
Washington, DC 20037-1526
Tel.: 202-861-9100
Fax.: 202-887-0689
State Bar of Michigan Member Number P33632

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

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 June 20, 2005 a true and correct copy of the following pleading was served via electronic mail, telecopy, or overnight mail upon the parties listed below:

OMNIBUS RESPONSE TO PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION FOR TOLLING OF DISEASE DEFICIENCIES AND REQUEST FOR SIX MONTH EXTESION [SIC] FOR CURING PAST AND FUTURE DISEASE DEFICIENCIES, PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION FOR TOLLING OF DISEASE DEFICIENCIES AND REQUEST FOR SIX MONTH EXTENSION FOR CURING PAST AND FUTURE DISEASE DEFICIENCIES, MOTION AND MEMORANDUM IN SUPPORT OF [REDACTED] AND [REDACTED] TO TOLL THE SIX MONTH DEADLINE FOR CURING RUPTURE DEFICIENCIES, MOTION AND MEMORANDUM IN SUPPORT OF [REDACTED] TO TOLL THE ONE YEAR DEADLINE FOR CURING DISEASE CLAIM DEFICIENCIES, AND MOTION OF NITA BALDWIN TO TOLL THE SIX-MONTH DEADLINE FOR CURING RUPTURE DEFICIENCY

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

By: _____
Deborah E. Greenspan
2101 L Street, N.W.
Washington, DC 20037-1526
Tel.: 202-861-9100; Fax.: 202-887-0689

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

LOCAL COUNSEL:
Lamont E. Buffington, Esq.
Garan, Lucow, Miller, Seward, Cooper & Becker
Woodbridge Place/1000 Woodbridge Street
Detroit, MI 48207-3192
Tel.: 313-446-1530; Fax: 313-259-0450
lbuffington@garanlucow.com

June 20, 2005 service parties:

CLAIMANTS' ADVISORY COMMITTEE

Dianna L. Pendleton-Dominguez
Law Office of Dianna Pendleton
401 N. Main Street
St. Mary's, OH 45885
Tel.: 281-703-0998/419-394-0717
Fax.: 419-394-1748
Dpend440@aol.com

Ernest H. Hornsby
Farmer, Price, Hornsby & Weatherford
100 Adris Place
Dothan, AL 36303
Tel.: 334-793-2424
Fax.: 334-793-6624
ehornsby@fphw-law.com

Sybil Niden Goldrich
256 South Linden Drive
Beverly Hills, CA 90212
Tel.: 310-556-1738
Fax.: 310-556-1858
sybilg58@aol.com

DEBTOR'S REPRESENTATIVES

Jeanne D. Dodd
Dow Corning Corporation
P.O. Box 994
Midland, MI 48686-0994
Tel.: 989-496-4980
Fax: 989-496-8543
j.d.dodd@dowcorning.com

Edward W. Rich
The Dow Chemical Company
2030 Dow Center
Midland, MI 48674
Tel.: 989-638-1700
Fax: 989-638-7133
ewrich@dow.com

Marcus Worsley
Dow Corning Corporation
Corporate Treasury CO 1116
P.O. Box 994
Midland, MI 48686-0994
Tel.: 989-496-1874
Fax: 989-496-8379
marcus.worsley@dowcorning.com

Jill K. Schultz
Nixon Peabody, LLP
P.O. Box 31051
Rochester, NY 14603-1051
Tel.: 585-263-1477
Fax: 866-947-1007
jschultz@nixonpeabody.com

DOW CORNING CORPORATION

Susan K. McDonnell
V.P., General Counsel and Secretary
Dow Corning Corporation
2200 W. Salzburg Road
Auburn, MI 48611
Tel: 989-496-5020
Fax: 989-496-8307
sue.mcdonnell@dowcorning.com

SHAREHOLDER COUNSEL

Laurie Strauch Weiss
Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York NY 10103-0001
Tel.: 212-506-3749
Fax: 212-506-5151
lstrauchweiss@orrick.com

Richard F. Broude
Richard F. Broude, P.C.
400 East 84th Street
Suite 22A
New York, NY 10028
Tel.: 917-301-3468
Fax: 212-628-1034
rfbroude@cs.com

COUNSEL TO
CLAIMANTS/MOVANTS

Leslie Bryan
Doffermyre Shields Canfield Knowles & Devine
1355 Peachtree Stree
Suite 1600
Atlanta, GA 30309
Tel: 404-881-8900
Fax: 404-881-3007
lbryan@dsckd.com

Thomas Dreiling
999 Third Avenue
Suite 3800
Seattle, WA 98104
Tel: 206-694-4600
Fax: 206-694-4601
tom@tdlaw.net

Rhett Klok
Motley Rice, LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464
Tel: 843-216-9218
Fax: 843-216-9430
rklok@motleyrice.com

Robert D. Steinhaus
Siegel, Kelleher & Kahn
426 Franklin Street
Buffalo, NY 14202
Tel: 800-888-5288
rsteinhaus@skklaw.com

FINANCE COMMITTEE

The Hon. Frank Andrews
P.O. Box 7829
4315 Lovers Lane
Dallas, TX 75209
Tel: 214-956-0050
Fax: 214-956-0053
fal@swbell.net

David Austern
Claims Administrator
Settlement Facility – Dow Corning Trust
3100 Main Street, Suite 700
Houston, TX 77002
Tel: 713-874-6060
Fax: 713-874-6061
daustern@claimres.com

Professor Francis E. McGovern
Duke University School of Law
P.O. Box 90360
Durham, NC 27708-0360
Tel: 202-744-6750
Fax: 919-613-7095
mcgovern@faculty.law.duke.edu

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MOTION FOR LEAVE TO FILE SUR-REPLY IN FURTHER RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION AND TO MOTION AND BRIEF ADOPTING THE MOTION OF THE CLAIMANTS' ADVISORY COMMITTEE FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION

Dow Corning Corporation ("Dow Corning") respectfully submits this *Motion for Leave to File Sur-Reply in Further Response to Motion Of Claimants' Advisory Committee For Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration And To Motion And Brief Adopting The Motion Of The Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration.*

Background

1. The Claimants' Advisory Committee filed its *Motion Of Claimants' Advisory Committee For Disclosure Of Substantive Criteria Created, Adopted And/Or Being*

Applied By The Settlement Facility And Request For Expedited Consideration ("CAC Motion") on December 7, 2004.

2. Subsequently, Dawn Barrios, on behalf of "Settlement Facility Disability A Claimants," filed the *Motion and Brief Adopting The Motion of the Claimants' Advisory Committee For the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration* (the "Barrios Motion") (together with CAC Motion, the "Motions").

3. Dow Corning filed a Response to the Motions on January 21, 2005.

4. The CAC filed a Reply on February 7, 2005 (the "CAC Reply"), which was joined in and adopted by Dawn Barrios on behalf of the "Spitzfaden Claimants" (the "Barrios Reply").

5. The CAC Reply incorrectly described Dow Corning's position as expressed in its Response, and leaves unclear what relief is actually requested by the CAC.

6. Although Dow Corning had hoped that the parties might be able to resolve the issues raised in the Motions through negotiation, they have not done so to date. Although the parties continue to discuss approaches to these issues, in light of the

hearing date Dow Corning therefore seeks leave to file the Sur-Reply attached hereto as Exhibit 1.

Request for Relief

7. By this Motion, Dow Corning respectfully requests that the Court enter an order in the form and substance attached hereto as Exhibit 2 to grant leave to Dow Corning to file the Sur-reply.

Respectfully submitted this 5th day of April 2005,

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

By: _____
Deborah E. Greenspan
2101 L Street, N.W.
Washington, DC 20037-1526
Tel.: 202-861-9100
Fax.: 202-887-0689
State Bar of Michigan Member Number P33632

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

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 April 5, 2005 a true and correct copy of the following pleading was served via electronic mail, telecopy, or overnight mail upon the parties listed below:

MOTION FOR LEAVE TO FILE SUR-REPLY IN FURTHER RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION *AND* TO MOTION AND BRIEF ADOPTING THE MOTION OF THE CLAIMANTS' ADVISORY COMMITTEE FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION.

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

By: _____
Deborah E. Greenspan
2101 L Street, N.W.
Washington, DC 20037-1526
Tel.: 202-861-9100; Fax.: 202-887-0689

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

LOCAL COUNSEL:
Lamont E. Buffington, Esq.
Garan, Lucow, Miller, Seward, Cooper & Becker
Woodbridge Place/1000 Woodbridge Street
Detroit, MI 48207-3192
Tel.: 313-446-1530; Fax: 313-259-0450
lbuffington@garanlucow.com

April 5, 2005 service parties:

CLAIMANTS' ADVISORY COMMITTEE
Dianna L. Pendleton-Dominguez
Blizzard, McCarthy & Nabers LLP
440 Louisiana Street
Suite 1710
Houston, TX 77002
Tel.: 713-844-3750
Fax.: 713-844-3755
dpendleton@blizzardlaw.com

Ernest H. Hornsby
Farmer, Price, Hornsby & Weatherford
100 Adris Place
Dothan, AL 36303
Tel.: 334-793-2424
Fax.: 334-793-6624
ehornsby@fphw-law.com

Sybil Niden Goldrich
256 South Linden Drive
Beverly Hills, CA 90212
Tel.: 310-556-1738
Fax.: 310-556-1858
sybilg58@aol.com

DEBTOR'S REPRESENTATIVES
Jeanne D. Dodd
Dow Corning Corporation
P.O. Box 994
Midland, MI 48686-0994
Tel.: 989-496-4980
Fax: 989-496-8543
j.d.dodd@dowcorning.com

Edward W. Rich
The Dow Chemical Company
2030 Dow Center
Midland, MI 48674
Tel.: 989-638-1700
Fax: 989-638-7133
ewrich@dow.com

Marcus Worsley
Dow Corning Corporation
Corporate Treasury CO 1116
P.O. Box 994
Midland, MI 48686-0994
Tel.: 989-496-1874
Fax: 989-496-8379
marcus.worsley@dowcorning.com

Jill K. Schultz
Nixon Peabody, LLP
P.O. Box 31051
Rochester, NY 14603-1051
Tel.: 585-263-1477
Fax: 866-947-1007
jschultz@nixonpeabody.com

DOW CORNING CORPORATION
Susan K. McDonnell
V.P., General Counsel and Secretary
Dow Corning Corporation
2200 W. Salzburg Road
Auburn, MI 48611
Tel: 989-496-5020
Fax: 989-496-8307
sue.mcdonnell@dowcorning.com

BARRIOS KINGSDORF & CASTEIX, L.L.P.
Dawn M. Barrios
Barrios Kingsdorf & Casteix, L.L.P.
701 Poydras Street, Suite 3650
New Orleans, LA 70139-3650
Tel: 504-524-3300
Fax: 504-524-3313

SHAREHOLDER COUNSEL
Laurie Strauch Weiss
Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York NY 10103-0001
Tel.: 212-506-3749
Fax: 212-506-5151
lstrauchweiss@orrick.com

Richard F. Broude
Richard F. Broude, P.C.
400 East 84th Street
Suite 22A
New York, NY 10028
Tel.: 917-301-3468
Fax: 212-628-1034
rfbroude@cs.com

FINANCE COMMITTEE
The Hon. Frank Andrews
P.O. Box 7829
4315 Lovers Lane
Dallas, TX 75209
Tel: 214-956-0050
Fax: 214-956-0053
fa1@swbell.net

FINANCE COMMITTEE – Cont'd.

Professor Francis E. McGovern
Duke University School of Law
P.O. Box 90360
Durham, NC 27708-0360
Tel: 202-744-6750
Fax: 919-613-7095
mcgovern@faculty.law.duke.edu

Elizabeth Wendy Trachte-Huber
Claims Administrator
Settlement Facility – Dow
Corning Trust
3100 Main Street, Suite 700
Houston, TX 77002
Tel: 713-874-6060
Fax: 713-874-6061
ewhuber@sfdct.com

Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

SUR-REPLY IN FURTHER RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION AND TO MOTION AND BRIEF ADOPTING THE MOTION OF THE CLAIMANTS' ADVISORY COMMITTEE FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION

Dow Corning Corporation ("Dow Corning") respectfully submits this Sur-Reply in response to the *Reply of Claimants' Advisory Committee to Dow Corning's Response to Motion Of Claimants' Advisory Committee For Disclosure Of Substantive Criteria Created, Adopted, And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration* (the "CAC Reply") and the *Reply Of Spitzfaden Claimants To Dow Corning's Response To The Motion For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility and Request for Expedited Consideration* (the "Barrios Reply").[1]

[1] The Barrios Reply simply joins in and adopts the CAC Reply.

The original CAC Motion and Barrios Motion[2] (together, "Motions") on their face sought incredibly sweeping and inappropriate relief in the form of wholesale disclosure of confidential and judicially protected work-product and claimant communications of the SF-DCT. This relief was premised on the assertion that the SF-DCT was misinterpreting the requirements for a Disease Option I, Disability Level A payment by adopting a supposedly secret interpretation applied by the MDL 926 Claims Office and articulated by Judge Pointer in an appellate MDL proceeding, which had, unbeknownst to claimants or the CAC, supposedly "changed" those requirements.

The premise of both Motions was simply wrong: Judge Pointer's decision did not "change" any rule; rather, it was an affirmation of the correct and perfectly reasonable interpretation of the disease definitions in the MDL 926 proceedings that have been incorporated into the Plan language. Nevertheless, Dow Corning indicated in its Response that it would not object to more prominent disclosure of the Disability Level A standard if it would help alleviate any misunderstanding held by some claimants in light of the language that the SF-DCT had put in its notification of status letters. Dow Corning made clear, however, that it *did* object to the extraordinary breadth of relief apparently requested in the Motions, which went well beyond more prominent disclosure of the Disability Level A standard (the *sole* basis for the CAC's

[2] Unless otherwise noted, capitalized terms have the same meaning as defined in Dow Corning's Response to the CAC Motion and Barrios Motion.

complaint and request for relief) to encompass almost *anything* applied, considered or decided by the SF-DCT in its claims review and decision-making processes.

This Sur-Reply is necessitated by the confusing nature of the relief requested. A wholesale disclosure could create numerous disputes among the parties: it would undermine the foundation of the settlement by removing the shield of judicial protection from the decision-making of the SF-DCT and, in violation of the Plan, allowing the parties (and forcing the Court) to second-guess each and every claim decision and interpretation made by the SF-DCT. Accordingly, Dow Corning renews its suggestion that the guidelines adopted by the SF-DCT be reviewed by the MDL 926 facility to identify only those situations where there are discrepancies or, alternatively, Dow Corning suggests that the claims audit process currently underway could achieve the same result.

Argument

I. The Factual Premise Underlying the Barrios' and CAC's Position is Incorrect – Judge Pointer's Decision Was an Articulation of the Perfectly Proper *Interpretation* of the Disability Level A Criteria and Did Not "Change" the Standard Expressed in the Plan, Therefore No "Remedy" Is Required

To the extent the CAC continues to argue that Judge Pointer's interpretation of the Disability Level A standard in the MDL was wrong, thereby leaving open a question as to "what remedy to apply to claimants who were not afforded adequate disclosure prior to submitting their claim," CAC Reply at 1-2, Dow Corning must

object.[3] The CAC asserts that "all claimants who received a deficiency [notice] because they did not have access to the *correct* criteria prior to the submission of their claim should be afforded a new opportunity to submit a claim to qualify." CAC Reply at 3 (emphasis added). This reflects a fundamental error with the premise of the CAC's Motion and the relief they seek – claimants always had access to the "correct" criteria – that is, nothing about that criteria as set forth in the Plan was changed.

For the Court's reference, Dow Corning attaches hereto as Exhibit A the RSP Defendants' Memorandum In Opposition To Plaintiffs' Motion For Disclosure of Substantive Criteria Adopted And/Or Being Applied By the MDL Claims Office (the "RSP Memorandum"), since the RSP Defendants can speak with more direct knowledge of Judge Pointer's ruling and of the application of the criteria in the MDL. As they explain, Judge Pointer's ruling did not "change" any rule but, rather, simply expressed the perfectly reasonable and correct interpretation of the Plan language that is in full accord with basic points of grammar. Moreover, they show that his ruling was anything but "secret."[4] For these reasons, Dow Corning stated, and reiterates herein,

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[3] The CAC Reply now all but ignores the factual allegations concerning the supposed impropriety of the Disability Level A interpretation, which provided the narrow basis for the broad relief sought, adding only greater confusion to what actual relief they claim and why. On the one hand, the CAC Reply demands a "remedy" for individuals whose claims were decided under this standard. On the other hand, they request "additional information to determine if the annotations developed by the Settlement Facility accurately reflect how claims were processed in the Revised Settlement Facility," implying that the interpretation of the Disability Level A language applied by the MDL claims office *was* correct, and that the CAC only seeks to determine if the SF-DCT is applying that standard differently. CAC Reply at 4.

[4] Similarly, the CAC wrongly asserts that both Plan Proponents had no idea that the Disability Level A language had been "interpreted and purportedly modified by Judge Pointer," citing to a November 19, 2001 memorandum from Deborah Greenspan stating that "We do not believe that Judge Pointer issued an order changing the wording of

that it does not object to more prominent disclosure of the already public interpretation of the Disability Level A standard to alleviate any claimant misunderstanding of those criteria. However, there was never anything "wrong" about that interpretation and no "change" was made to the criteria that would demand a "remedy."[5]

II. The Sweeping Relief Requested In the Motions Is Uncalled For And Entirely Inappropriate

In its Response, Dow Corning reasonably stated that it would not object to the Motions to the extent they "simply seek more prominent disclosure of the standard for evaluating a claim for Disability Level A." Dow Corning Response at 2. Dow Corning noted that those standards for Disability Level A were already being disclosed to claimants via Notification of Status letters and via telephone. Crucially, those standards are not confidential as they are reflected in Judge Pointer's public ruling. Thus, if the language in the Plan with respect to the Disability Level A criteria was confusing to

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the disability guideline." CAC Motion at 9-10 (quoting CAC Motion, Ex. 12, Memo dated 11/19/01 from D. Greenspan to W. Trachte-Huber). However, this memorandum responded to a question about whether Judge Pointer changed the language of the standard for Disability Level A from "... or self care" to "... and self care," clearly reflecting that the issue had been raised *over three years ago*. More importantly, while the memo expressed the belief that Judge Pointer did not alter "the wording of the disability guideline," the CAC conveniently leaves out the rest of the response: "To the extent that Judge Pointer or the MDL claims office has *interpreted* the meaning of the guideline through annotation or other examples, the Settlement Facility is required to apply these interpretations." CAC Motion Exh. 12 (emphasis added). What was true three years ago remains true today – Judge Pointer did not change or modify the wording of the guidelines, but only issued a ruling providing the only reasonable interpretation of those guidelines, and the SF-DCT was and is required to apply that interpretation.

[5] In any event, SF-DCT claimants who may have misunderstood the criteria for Disability Level A and mistakenly believed that they could qualify without regard to performance of both vocation and self-care received deficiency letters and were given an opportunity to cure. Thus, existing claimants who, as a factual matter, could satisfy the criteria were already able to demonstrate their eligibility after having any such misunderstanding corrected. All other claimants who did not satisfy the criteria because, as a factual matter, they were limited in performance of one but not the other would not have been able to satisfy the criteria anyway, regardless of any misunderstanding they may have held.

some claimants, Dow Corning did not and does not object to more prominent disclosure of that standard. Such relief would be limited and tailored to the specific complaint that prompted the Motions, and could be appropriate to the extent the standards are not confidential and could alleviate confusion of certain claimants.

However, Dow Corning's Response made clear that it *did* object to what appeared to be the incredibly overbroad relief sought by the CAC's Motion.[6] Nevertheless, the CAC appears to take Dow Corning's limited statement that it would not object to more prominent disclosure of the already-public standard for evaluating a claim for Disability Level A to somehow support the CAC's sweeping request for public disclosure of *anything* that the SF-DCT discloses to individual claimants in the context of their own claims and records. The CAC extends Dow Corning's limited statement and now attributes to Dow Corning a statement that information that is being disclosed telephonically or during the deficiency process should be disclosed "at an earlier stage in the process" and that this should apply to "*virtually all requests for information by a claimant* to cure a deficiency." CAC Reply at 2 (emphasis added). This accurately describes the improperly overbroad relief requested by the CAC, which now states in its Reply that "*[a]ll* information and criteria that is disclosed telephonically or in written deficiency letters by the Settlement Facility (and/or the MDL 926 Claims Office) *must* be

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[6] *Compare* Dow Corning Response at 2 ("Such a broad based requirement violates both the fundamental premise and settlement process specified in the [Plan] as well as prior Orders of this Court and the MDL Court and must therefore be denied.") *with* Response at 11 ("if the [CAC] seeks only to require disclosure of the Disability Level A standard at an earlier stage in the process, then Dow Corning agrees such early disclosure is appropriate").

disclosed in written form to claimants..." CAC Reply at 3 (emphasis added).[7] However, it is an *inaccurate* description of Dow Corning's position -- Dow Corning does *not* believe anything and everything disclosed to individual claimants in response to their individual claims can or should be disclosed to all claimants.

First, such relief is wholly impractical. By necessity, SF-DCT responses to claimants, both telephonically and in deficiency letters, involve application of the guidelines to the specific claims at issue, and are thus case and fact-specific. Indeed, the CAC implicitly recognizes this in its Reply when the CAC asserts that claimants are provided detailed information "when they call to seek clarification about or help curing *their* claim deficiency." CAC Reply at 2 (emphasis added). The information the SF-DCT provides to individual claimants thus reflects application of the rules to a claimant's own case and facts. To require, as the CAC requests, ongoing publication of such claim-specific rule interpretations and applications would create an impossible task of determining *what* would be disclosed. The SF-DCT makes numerous claim-related interpretations and determinations every day, and thus an endless array of confidential information would have to be disclosed continuously with every new claim that comes in the door. Must each new application of the rules to a particular claim be posted for all to see? And would all whose claims were already processed before publication of

[7] Indeed, it appears that the CAC seeks disclosure of all "confidential annotations," *see* CAC Reply at 1, although they had previously advised Dow Corning that they did not. *See* Dow Corning Response at 2. n1.

such new applications be entitled to a "remedy"? Clearly, the logic behind the CAC's motion would leave no end to what would need to be "disclosed."

Second, such broad-brushed disclosure of all interpretative standards the SF-DCT applies to claims it reviews would generate tremendous confusion for many claimants, who would be misled into believing that qualification can be based on "buzz words" contained in such interpretations, without appreciating that it is the *proof* demonstrating that those standards have been satisfied that is required.[8]

Third, such wholesale disclosure of detailed and individually tailored determinations and guidelines would invite endless litigation as to the meaning and validity of every factual interpretation applied by the SF-DCT and the minutia of the standards it must apply to individual cases. Such second-guessing by claimants or other parties is precisely what the Plan Proponents sought to avoid and what the Plan specifically precludes. The Plan provides for claim appeals to an Appeals Judge, and the process does not include a right of appeal of individual claims to the District Court. *See Annex A* to the *Settlement Facility Agreement* §§ 8.02, 8.04, and 8.05. Such disclosure would thus violate the letter and spirit of the Plan.

Finally, and most importantly, such second guessing of judicially protected deliberative acts of the SF-DCT is impermissible. The SF-DCT's judicial work product

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[8] Indeed, it is the SF-DCT's judicial process of applying the Plan criteria to the individual factual *proof* submitted with each claim that necessitates the development of judicial guidelines for interpreting the rules to be applied to individual claims.

and privileged deliberative process are not subject to disclosure. As this Court's previous Order has already made clear, all actions taken by the Claims Administrator (or any of her employees or agents) in "implementing the Settlement Facility and in collecting, collating, processing, evaluating, and paying claims" constitute "judicial actions of this Court and shall be protected, to the maximum extent allowable by law, by the doctrine of judicial immunity." *See* Exhibit B (Order Approving Elizabeth W. Trachte-Huber As Successor Claims Administrator Pursuant To The Settlement Facility and Fund Distribution Agreement (Nov. 29, 2000)). The disclosure the CAC requests would violate the confidentiality required to protect claimant confidences and to allow the SF-DCT to function as recognized by the Court. *See also* Exh. A (RSP Defendants' Memorandum) at 15-18.

To the extent the CAC Reply requests that the SF-DCT and MDL 926 Claims Office work together to ensure consistency, Dow Corning does not object if such coordination is permissible under the existing Orders and rules governing the two facilities. If there is a legitimate question as to whether the SF-DCT's application of the settlement criteria accurately reflects the interpretations applied in the MDL, then coordination between the facilities is appropriate. Indeed, the CAC and Debtor's Representatives have supported a review of guidelines to assure that rules are applied appropriately. Moreover, each facility should identify issues that should be the subject of additional questions and answers – in part to reduce the time currently allotted to

telephone conversations with claimants. However, to the extent the CAC Reply also now requests that the two facilities coordinate on annotations so that "*any* information that is disclosed to claimants when they call can be made publicly available to *everyone*" (CAC Reply at 5, emphasis added), that request must be denied. As noted above, such sweeping disclosure of confidential information is not permissible, is entirely impractical, and would necessarily implicate issues of individual claimants and claim reviews and violate principles of confidentiality and privilege.

Conclusion

For the reasons stated herein, the Motions must be denied.

Respectfully submitted this 5th day of April 2005,

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

By: _____

Deborah E. Greenspan
2101 L Street, N.W.
Washington, DC 20037-1526
Tel.: 202-861-9100
Fax.: 202-887-0689
State Bar of Michigan Member Number P33632

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

In re: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)	Master File No. CV 92-P-10000-S

RSP DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR DISCLOSURE OF SUBSTANTIVE CRITERIA ADOPTED AND/OR BEING APPLIED BY THE MDL-926 CLAIMS OFFICE

Peter W. Morgan
Bar No. 84950
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 785-9700

COUNSEL FOR BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC.

Richard M. Eittreim
Bar No. 94963
Jerry P. Sattin
Bar No. 84948
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
(973) 622-4444

COUNSEL FOR BRISTOL-MYERS SQUIBB COMPANY and MEDICAL ENGINEERING CORP.

Miles N. Ruthberg
LATHAM & WATKINS
633 W. Fifth Street
Suite 4000
Los Angeles, CA 90071-2007
(213) 485-1234

COUNSEL FOR 3M COMPANY

William A. Krohley
KELLEY, DRYE & WARREN
101 Park Avenue, 32nd Floor
New York, NY 10178
(212) 808-7800

COUNSEL FOR UNION CARBIDE CHEMICAL & PLASTICS CO. and UNION CARBIDE CORPORATION

PRELIMINARY STATEMENT

The RSP Defendants submit this joint response in opposition to Plaintiffs' Motion for "Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the MDL 926 Claims Office." Their one-paragraph motion annexes and incorporates the arguments contained in a motion filed in *In re Dow Corning Corporation*, Case No. 00-CV-00005-DT (E.D. Mich.), entitled "Motion of Claimants' Advisory Committee for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration." It requests that this Court and the Honorable Denise Page Hood, U.S.D. J., who presides over the Dow Corning bankruptcy, consider the issues raised by sitting jointly. Recent developments in the Dow Corning bankruptcy reflect a substantial narrowing of the differences between the parties with respect to that motion.[1]

An even-handed review of the record submitted by the plaintiffs on this motion reveals no reason for the disclosure of confidential Claims Office work product. First, the privilege protecting judicial work product should bar disclosure. In Order No. 15, the Court ordered that the actions of the Claims Administrator "in collecting, collating, processing, evaluating, and paying claims ***will constitute judicial actions of this court and be protected, to the maximum extent allowable by law, by the doctrine of judicial immunity.***" Order No. 15 (emphasis added). Accordingly, principles protecting confidential judicial deliberations extend to the materials that are the subject of this motion.

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[1] In their most recent filing in the Dow Corning case, the Claimants' Advisory Committee states that the "parties have found a lot of common ground, including it appears agreement on a fundamental point which resolves much of the pending Motion." Reply of Claimants Advisory Committee to Dow Corning's Response to the Motion for Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration," at 1 (attached as Exhibit 1). Although it is premature to predict whether progress in the Dow Corning matter will moot the issues raised on this motion, the RSP Defendants remain open to further discussion to resolve the issues amicably.

Second, the issue plaintiffs raise of a secret, unauthorized modification to the terms of "Disability A" criteria in the RSP is simply mistaken. Judge Pointer's Order of September 30, 1997, which is at the center of plaintiffs' application, was never a secret, was served upon the defendants, and has been located in their files. It was included in a group of appeal decisions by Judge Pointer, which state on their face that they were served by the Court on all parties on the Service List, plus the Claims Administrator, and the individual appellant or her attorney. We believe the Order has always been in the Court's docket. Moreover, the September 30 Order was squarely decided under the Court's expressly reserved authority to interpret the terms of the settlement. Simply put, there was no secret *ultra vires* judicial activity as the plaintiffs appear to suggest.

Apart from the Court's authority to issue the September 30 Order, the Court in that Order correctly interpreted the language of the Disability "A" criteria. Plaintiffs' misreading of this language is simply based upon a point of English usage, which the Court correctly understood. Indeed, one way of looking at plaintiffs' motion is that it is based upon a mistaken point of grammar and usage.

Nor should the Court permit disclosure of confidential work product protected by the judicial privilege in the absence of a strong showing of need. The problem alleged by the plaintiffs has to do with the Dow Corning settlement, not the RSP. The plaintiffs' own statistics fix the RSP as the benchmark for the number of approved Disability "A" claims, and the gravamen of their complaint is that the Dow Corning settlement facility does not approve these claims at as high a rate. Why, then, should RSP Claims Office work product be disclosed when, to put it bluntly, there is no beef with the RSP?

Finally, plaintiffs' apparent effort to litigate decisions made years ago by the Court presiding over the RSP should be rejected. The RSP was designed to settle claims, not to create

a new litigation. That is why the RSP provides that appeals decisions of the Court or its designee are final and no further appeal is permitted. Doctrines of judicial repose, law of the case, and stare decisis all militate against disclosure.

Accordingly, for these reasons, and for the reasons set forth below, plaintiffs' motion to disclose Claims Office work product protected under the doctrine of judicial immunity should be denied.

BACKGROUND

Three aspects of the Revised Settlement Program will provide much needed context for the issues raised on plaintiffs' motion. First, in the overall scheme of benefits provided under the RSP, the place of Disability Level "A" is mostly history at this point, for it applied only to a subset of claims most of which have already been processed and paid. Second, the RSP was structured to accord the Court the power to resolve issues of interpretation of settlement criteria, so that any interpretation of settlement criteria made in the past was well within the authority of the Court, was public, and now should constitute the "law of the case." Third, the claims process, including the appeal procedures, has always provided complete and thorough information to claimants about the nature of their claims, and the decisions of Judge Pointer and later those of Judge Andrews were intended to be the last word.

A. The Place of Disability "A" in the Schedule of Benefits

The central issue raised by plaintiffs' motion is the criteria for Disability Level "A," applicable only to a subset of RSP claimants: Current Claimants who meet the criteria for certain conditions set forth in the original global disease schedule at Disability Level "A." Some background is helpful to place this group in perspective.

The RSP divides claimants into three categories: Current Claimants, Other Registrants, and Late Registrants. "Current Claimants" are defined as eligible participants who registered with the global settlement by September 16, 1994, and who submitted to the Claims Office by October 17, 1994, "a substantially complete Current Disease Compensation Form with sufficient documentation to be classified by the Claims Office under the global settlement as a current claimant." RSP Notice ¶11(d) (attached hereto as Exhibit 2). "Other Registrants" are those who

are not Current Claimants but who registered with the Claims Office by March 1, 1995.[2] "Late Registrants" are those who registered after the March 1, 1995, deadline. *Id.*

The RSP provides so-called "Long-term Benefits" to all claimants who satisfy the criteria set forth in Exhibit E1 of the RSP Notice. RSP Notice ¶ 12(b). The Program affords a special option, however, only for Current Claimants: the Fixed Amount Benefit Schedule. The RSP Notice describes this option in the following terms:

> As an alternative to benefits under 12(b) above, "Current Claimants" (defined in 11(d) above) who have had a Bristol, Baxter, or 3M breast implant may elect to receive a fixed payment under the following Fixed Amount Benefit Schedule ***based on disability/severity levels specified in the Disease Schedule of the global settlement*** for diseases described in that Schedule (rather than under the more restrictive criteria of the revised settlement).

RSP Notice ¶ 12(c) (emphasis added). Accordingly, while the plaintiffs state that "a cornerstone of the Revised Settlement Program was that the disease and disability criteria in the global settlement would remain unchanged," Plaintiffs' Brief at 3, they also recognize correctly that only the Fixed Amount Benefit Schedule was adopted from the original global settlement. The Long-Term Benefit Schedule was not; it was especially adopted for the RSP, and plaintiffs' concern with Disability "A" criteria has nothing to do with the Long-Term Benefit Schedule.

Within the subset of Current Claimants who choose "Fixed Benefits" (thereby foregoing Long-Term Benefits), claimants may seek to qualify under various "disease" or symptom clusters: scleroderma, lupus, atypical neurological disease syndrome (ANDS), mixed connective tissue disease (MCTD), polymyositis, dermatomyositis (PM/DM), primary Sjogren's syndrome, and atypical connective tissue disease (ACTD). Breast Implant Litigation Settlement Notice, Exhibit D (attached hereto as Exhibit 3). The concern with Disability "A" applies only to current

[2] In addition, prior opt-outs from the global settlement who withdrew their exclusions and registered by December 16, 1996, are "other registrants." RSP Notice ¶ 11(d).

claimants who qualify under the ANDS, MCTD, PM/DM, Sjogren's, and ACTD categories. *Id.*

Accordingly, the concern raised on plaintiffs' motion applies only to Current Claimants who forego Long-Term Benefits and choose Fixed Benefits instead; and within that subset, to those who seek benefits for specified conditions at Disability Level "A." Moreover, as plaintiffs state, processing of the current disease claims was largely completed by the third quarter of 1997. Plaintiffs' Brief at 3. With respect to the RSP, the Disability Level "A" issue raised here applies only to those few current disease claims not yet processed under the Fixed Benefit criteria. It has nothing to do with the vast majority of claims being processed today – which almost exclusively involve the Long-Term Disease Benefits to which Disability A does not apply.[3]

B. <u>The Authority of the Claims Office, Judge Andrews and the Court under the RSP</u>

The Claims Administrator was appointed in Order No. 15, which expressly conferred upon her the protections afforded under the doctrine of judicial immunity:

> Judge Ann Tyrrell Cochran of Houston, Texas, is appointed as Claims Administrator, effective April 7, 1994, under the authority of Federal Rule of Civil Procedure 53 and in exercise of the court's general powers and responsibilities over class action settlement. ***Her actions as Claims Administrator (and those of her employees or agents) in collecting, collating, processing, evaluating, and paying claims will constitute judicial actions of this court and be protected, to the maximum extent allowed by law, by the doctrine of judicial immunity.***

Order No. 15 ¶ 2(b) (emphasis added) (attached hereto as Exhibit 4).[4]

The MDL Court retained substantial authority over the RSP in several important respects:

> The Court retains general powers to administer and implement the settlement, ***including the power to interpret the terms of the settlement*** and to resolve on an equitable basis conflicting claims to benefits arising because of death of a participant or asserted assignments or liens relating to payment of benefits.

[3] The Long-Term Diseases do have disability levels, but they turn upon different criteria.

[4] Paragraph 26 of the RSP Notice incorporates this term into the RSP.

RSP Notice ¶ 26 (emphasis added). Similarly, the Claims Office was subject to the Court's supervision:

> Operations of the Claims Office will be subject to the continuing jurisdiction of the Court and subject to Court review.

RSP Notice ¶ 30(e). Finally, the Court's authority – as plaintiffs note – extended to the appeals process built into the RSP:

> A claimant dissatisfied with the decision made by Claims Officers may appeal to the Claims Administrator and, if still dissatisfied, may seek a further review, on the basis of the record evidence, by the Court (or a person designated by the Court to conduct such review). ***No other appeals or reviews are permitted***, and the settling defendants will have no right of appeal or review from determinations made by the Claims Office.

RSP Notice ¶34 (emphasis added). Although plaintiffs contend that the appeals process did not contemplate "global interpretations," the fact is that the Court was the final interpreter of the settlement whether that authority was exercised under Paragraph 26, 30(e) or 34. It is also clear that the MDL Court had no intention of turning its own interpretations of settlement issues into a new litigation process. That is why, among other things, "no other appeals or reviews are permitted." *Id.* This provision was designed to avoid protracted disputes over Claims Office determinations. Simply put, the purpose of the settlement was to avoid litigation, not to create a new one.

These principles were preserved when the Court's powers under the appeals process were subsequently delegated to the Honorable Frank Andrews:

> This court hereby appoints the Honorable Frank Andrews to decide all appeals from the decisions of the Claims Administrator, effective May 13, 1998. Judge Andrews may exercise the same degree of equitable discretion on such matters as timeliness of filings and other similar administrative questions as has been exercised by the court in conducting such reviews. ***Judge Andrews' decisions will be final; no appeals or reviews will be permitted from such decisions.***

Order 27L (Corrected) entered May 20, 1998 (emphasis added) (attached as Exhibit 5). In Order No. 27N, Judge Andrews's authority was described in the following terms:

> On May 13, 1998, after consultation with Plaintiffs Liaison Counsel and the Claims Administrator, and consistent with the provisions of the RSP Notice, the court appointed the Honorable Frank Andrews to serve as the court's designee for purposes of deciding all subsequent appeals from the decisions of the Claims Administrator. . . . ***Judge Andrews's decision as to these or any subsequent claimant appeals will be a final determination, and no further appeal to this court will be permitted.***

Order 27N (emphasis added) (attached as Exhibit 6).

Accordingly, the RSP was structured in a way to give the Court the last word on interpretation of the terms of the RSP, and upon the Court's designee to resolve issues raised in appeals from decisions of the Claims Administrator. No further appeal was contemplated.

C. <u>Information Provided to Claimants About Claims</u>

It is also important to dispel the notion that the Claims Office has been secretive about its handling of claims. A review of the record of Claims Office procedures indicates that the Claims Office has consistently endeavored to provide claimants with full and complete information about their claims. Each claimant in the RSP receives a Notification of Status letter. In a Q&A Booklet provided to each claimant, the contents of the Notification of Status letter are described as follows:

> Q. What will that notification of status letter say?
>
> A. If you are a current claimant, the letter will notify you:
>
> 1. that you are classified as a current claimant;
>
> 2. whether your proof of manufacturer is satisfactory (if you have returned that form);
>
> 3. whether any documentation submitted in support of a rupture supplement is satisfactory;

4. whether your disease compensation claim under the original settlement criteria was approved and, if not, describing the deficiencies in that submission; and

5. that you have 45 days from the date of that letter to reject the revised settlement program, if you desire (unless you earlier waived that opt-out right).

RSP Q&A 86 (attached as Exhibit 7).[5] After receipt of a Notification of Status letter, a claimant may submit additional medical documentation to correct any deficiencies so long as she does so before the RSP terminates in 2010. Q&A 98-101.

The Claims Office also prepared detailed Q&A's specifically relating to deficiencies identified in Notification of Status letters. They explain in considerable detail why a claim may be found to have a deficiency. For example, the following explanation is provided if the NOS letter states: "Information contained in your claim documents indicates that you are not disabled by a compensable condition":

> Your medical documentation affirmatively reveals that you are not disabled. If this is incorrect, this deficiency can possibly be cured by providing a statement from your QMD or treating physician describing your current disability and providing a satisfactory explanation for the contradictory information submitted earlier.

Q&A 5-4 A.4 (Exhibit 8). If the NOS letter states, "Information contained in your claim documents indicates that the disability determination is inconsistent with settlement criteria," it means:

> Your QMD or treating physician made a determination of your disability, but information about your pain or limitations on your activities (either in the QMD's statement or elsewhere in your records) conflicts with the requirements for that disability level. This deficiency can possibly be cured by a statement from your QMD or treating physician assigning a disability level that is appropriate for your condition or providing information about your disability that is consistent with settlement criteria for that level.

[5] A similar Q&A appears for Other Registrants. We focus here on Current Claimant information because of its immediate relevance to Disability "A" issues.

> (If your supplemental documentation provides new information in support of the disability level you originally claimed, please also provide an explanation for the contradictory information submitted earlier.)

Id. at A-5.

The record also reflects that the Claims Administrator made every effort to provide claimants with up-to-date information and to respond to frequent questions. In this regard, Supplemental Questions and Answers were published by the Claims Office on July 3, 1996, expressly addressing questions about current disease claim deficiencies. That document reveals that every disease claim was reviewed twice:

> Our claims officers spend an average of one to one-and-a-half hours for the initial review of each claim, reading every page of the medical documentation in the file. Each file is then reviewed a second time by one of our trained registered nurses.

Q&A1 (attached as Exhibit 9). With respect to Disability Level A, the Claims Office explained:

> If your physician assigned disability level "A," keep in mind that the settlement's definition of this disability level is a difficult one to meet. You must be unable to do any of your normal daily activities or only be able to do a very few of them. Read your claim documents carefully. Is there enough description of your daily life and limitations to allow a reader to know that you do indeed meet this strict definition of total disability? Remember, too, that it must be clear that the total disability is due to the symptoms of your applicable disease.

Q & A2.

D. <u>The September 30, 1997, Order</u>

Plaintiffs' narrative of the impact of a September 30, 1997, order of Judge Pointer (the "September 30 Order") is extremely confusing. First, plaintiffs suggest that Judge Pointer's decisions with respect to appeals were not made publicly available, and that plaintiffs obtained a copy of the September 30 Order on October 18, 2004, through the Dow Corning Claims

Administrator. However, the September 30 Order was not confidential.[6] It was entered in the docket on September 30, 1997, for case number CV-94-11558 and given the index number 1062. *See* Exhibit 10 (attached hereto). All counsel on the Service List apparently were served with the order in 1997, copies of which were found in the RSP Defendants' files. So far as we can tell, anyone who sought to monitor filings in the Lindsey or RSP docket could have read it at any time after it was entered in 1997.

The September 30 Order is not startling and represents no sea change in the Disability "A" criteria. In fact, it is perfectly consistent with the Disability Level "A" Q & A published by the Claims Office in 1996 and made available to every participant in the RSP. The Q & A said that total disability is a serious condition and that the standard is a "difficult one" to meet. It requires an inability "to do any of your normal daily activities or only be able to do a very few of them." Q & A2, *supra*. No sharp distinction was made in 1996 between the activities of vocation versus those of self-care because those activities constitute "normal daily activities."

Plaintiffs focus on the language of Disability Level "A" set forth in the original settlement notice. The sentence at issue reads:

> An individual will be considered totally disabled if she demonstrates a functional capacity adequate to perform none or only few of the usual duties or activities of vocation or self-care.

In the September 30 Order, Judge Pointer, expressly invoking the Court's authority to interpret the terms of the settlement, provided the following interpretation:

> There is some ambiguity or inconsistency in this language. ***Had the words "or only few" been omitted, the meaning would have been clear, namely a requirement that there be limitations affecting both vocational and self-care activities.*** The court, ***acting under its expressly reserved powers to interpret the terms of the settlement***, concludes that the inclusion of the phrase "or

[6] Indeed, under plaintiffs' theory, the Dow Corning Claims Administrator would have violated a confidentiality order had she turned a confidential document over to the plaintiffs.

> only few" was intended to provide some relaxation from that standard, by enabling a determination of total disability even though the person might be able to perform a few of the vocational or self care activities – and not, as Ms. ____ contends, to dispense with the requirement that there be limitations with respect to both self-care activities and vocational activities. In accordance with this interpretation, the Claims Administrator has consistently applied the language respecting disability level A for other claimants as she has with respect to Ms. ____ claim.

September 30 Order (emphasis added).[7] While it is true that Judge Pointer found some ambiguity in the words "or only few," he found no ambiguity in the absence of those words, but found that the language was "clear." That is to say, the language would have been clear if it stated:

> An individual will be considered totally disabled if she demonstrates a functional capacity adequate to perform none . . . of the usual duties or activities of vocation or self care.

The meaning of these clear words, according to Judge Pointer, was "a requirement that there be limitations affecting both vocational and self-care activities."

Judge Pointer was correct. "None" is defined as

> 1. No one; not one; nobody: *None dared to do it.* 2. Not any: *None of my classmates survived the war.* 3. No part; not any: *none of your business.* "

American Heritage Dictionary of the English Language (4th ed. 2000). Accordingly, in the sentence, "None of my acquaintances reads or writes," the meaning is that not one does either. The limitations involve both reading and writing. It does not mean that some acquaintances may do one or the other.

The authoritative work on English Usage confirms Judge Pointer's understanding of the grammar, which centers on the usage of the critical word "or" in comparison to "and":

[7] Following plaintiffs' lead, we have redacted the name of the claimant even though the RSP Defendants have copies of the unredacted order in their files, and even though the order should be available publicly in the Court's docket.

> [W]ith *and*, it does not matter whether we say *without falsehood and deceit* or *without falsehood and without deceit*, except that the latter conveys a certain sledge-hammer emphasis; **but with *or* there is much difference between *without falsehood or deceit* (which implies that neither is present) and *without falsehood or without deceit* (which implies that only one of the two is not present).**

Fowler's Modern English Usage (2d ed. 1965) at 422 (emphasis added). Stated otherwise, one may consider the sentence: "She does not sing and dance." According to Fowler, it does not matter whether we say "She does not sing and dance" or "She does not sing and she does not dance." Except for emphasis, the two sentences mean the same thing. With "or," however, there is a difference. "She does not sing or dance" means that she does neither. But "She does not sing or she does not dance" means that she does not do only one of them. This is the central point of the Disability "A" issue. Once again, the sentence (with the words "or only few" removed) reads:

> An individual will be considered totally disabled if she demonstrates a functional capacity adequate to perform none . . . of the usual duties or activities of vocation or self care.

This means that a totally disabled individual cannot do either the activities of vocation or self care for the same reason that an individual who cannot sing or dance cannot do either one. Following Fowler's Modern English Usage, the sentence would have to read as follows to give it the meaning plaintiffs seek:

> An individual will be considered totally disabled if she demonstrates a functional capacity adequate to perform none . . . of the usual duties or activities of vocation ***or none of the usual duties or activities of*** self care."

In short, Judge Pointer's interpretation of the critical sentence was correct. *Cf. De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956) ("We start with the proposition that the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and'

would express the thought with greater clarity. The trouble with the word has been with us for a long time . . .").

In turning then to "only a few," Judge Pointer concluded that these words were intended "to provide some relaxation from that standard, by enabling a determination of total disability even though the person might be able to perform a few of the vocational or self care activities." Judge Pointer was also careful to add that "the Claims Administrator has consistently applied the language respecting Disability level A for other claimants as she has with respect to Ms. ____ claim." September 30 Order ¶2. Accordingly, there was no change in interpretation of Disability "A" criteria but an interpretation aimed to preserve consistency in treatment for all claimants seeking to qualify under that standard.

Plaintiffs state there was additional correspondence involving the Court, the Claims Administrator, and Judge Andrews involving the Disability "A" criteria. They have requested disclosure of that correspondence, but the Dow Corning Claims administrator has properly declined to disclose it in the absence of authority to do so. These are among the materials Plaintiffs seek to have disclosed on this motion.

Plaintiffs' narrative leaves the impression that the September 30 Order, while intending to relax the Disability "A" standard, represented a secret modification to the negotiated disability criteria that made the criteria more, not less, difficult to meet. The record reveals, however, first, that Judge Pointer acted well within his authority in interpreting the language of Disability "A," second, that he correctly interpreted that language, and third, that his interpretation was made public.

Plaintiffs' narrative is confusing in another respect: they allege that they have received multiple complaints from claimants and their attorneys in the Dow Corning Settlement Facility about the application of Disability "A" criteria, and they provide statistics purporting to

demonstrate that approval rates for Disability "A" in the Dow Corning settlement are lower than those in the RSP – that is, that twice as many Disability A claims were approved in the RSP as compared to the Dow Corning settlement. But they do not allege a single complaint about treatment of Disability "A" claims in the RSP. In short, whatever the problem in the Dow settlement – if there is one – there is no evidence of a problem with the RSP.

ARGUMENT

It is difficult to understand precisely the extent of the relief plaintiffs seek on this motion, especially in light of recent developments in the Dow Corning bankruptcy. *See supra* n. 1. On its face, the breadth of the motion is extraordinary. It calls for disclosure "of any substantive criteria, created, adopted, and/or applied by the MDL 926 Claims Office." Yet the problem outlined in considerable detail in the Memorandum relied upon by the Plaintiffs in support of the motion narrowly focuses on a single item: the criteria for Disability "A." As described more fully below, plaintiffs seek disclosure of core judicial work product presumptively privileged by law. Moreover, plaintiffs' motion challenges principles of judicial repose, law of the case, and *stare decisis* by seeking to engage in new litigation over the terms of a ten-year old settlement. The RSP Defendants respectfully urge that the Court deny plaintiffs' application.

A. Claims Office Materials Constitute Judicial Work Product and Privileged Deliberative Process Materials Not Subject to Disclosure

The law recognizes the confidentiality of judicial work product in several respects. First, the judicial branch is exempt from the Freedom of Information Act. *See May v. U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993); *United States v. Casas*, 376 F.3d 20, 22 (1st Cir. 2004). Second, the existence of a privilege protecting confidential judicial deliberations is well-established. In *In re Certain Complaints under Investigation by an Investigating Committee*

of the Judicial Council of the Eleventh Circuit (Williams v. Mercer), 783 F.2d 1488 (11th Cir. 1986), the Eleventh Circuit traced the history of the privilege and concluded as follows:

> We conclude, therefore, that there exists a privileged (albeit a qualified one, *infra*) protecting confidential communications among judges and their staffs in the performance of their judicial duties.

Id. at 1520. The privilege is based on the need for candid discourse among judges, their colleagues, and their staffs:

> Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges' independent reasoning from improper outside influences. It also safeguards legitimate privacy interests of both judges and litigants.

Id. at 1519-20.

The privilege is a qualified one, and in *In re Certain Complaints*, the Eleventh Circuit set forth the procedure for its application. The first step places the burden on the party asserting the privilege to demonstrate "that the matters under inquiry fall within the confines of the privilege." *Id.* at 1520. In the case before the Court, appointment diaries, calendars, telephone messages and the like did not fall within the privilege whereas communications between the judges and their staff on matters before the Court satisfied the burden. Once that burden is met, "those matters are presumptively privileged and need not be disclosed unless the investigating party can demonstrate that its need for the materials sufficiently great to overcome the privilege." The Court further explained:

> To meet this burden, the investigating party can attempt to show the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means. The court then must weigh the investigating party's demonstrated need for the information against the degree of

> intrusion upon the confidentiality of privileged communications necessary to satisfy that need.

Id. at 1522.

These analytical principles apply here. Under Order No. 15, actions of the Claims Administrator were made to "constitute judicial actions of this court and be protected, to the maximum extent allowed by law, by the doctrine of judicial immunity." As the Court's designee, Judge Andrews is entitled to those same privileges and, in the order providing for his designation, was afforded the same degree of "equitable discretion" as the Court in deciding issues within his jurisdiction. *See* Orders 27L and N. The materials plaintiffs seek fall squarely within the scope of the privilege, for plaintiffs seek core materials created in the claims process: communications between the Claims Administrator and the Court or the Court's designee, and communications between the Claims Administrator and her staff. Moreover, the confidential nature of these materials was recognized in the Joint Order entered by Judge Hood and the late Judge Nelson under which RSP Claims Office materials were shared with the Dow Corning Settlement Facility:

> In addition, ***all materials prepared by the MDL 926 Settlement Fund employees***, except those that have been generally distributed to claimants and attorneys, ***are confidential and proprietary and shall not be shared with persons outside the claims office***, except with the written authorization of the MDL 926 Claims Administrator or the MDL 926 Court. If any of these materials are shared with the Appeals Judge and/or Dow Corning Settlement Facility employees, those persons are also bound by this order of Confidentiality.

Exhibit 11 (emphasis added). Accordingly, the materials sought are presumptively privileged and the burden turns to the plaintiffs to demonstrate need.[8]

[8] Similar to the judicial work product privilege is the privilege protecting communications in the deliberative process. In *Schell v. United States Department of Human Services*, 843 F.2d 933, 939-40 (6th Cir. 1988), the deliberative process privilege was found to protect the communications of an Administrative Law Judge, and in *Hinckley v. United States*, 140 F.3d 277, 283 (1998), it was applied to the proceedings of a parole board. The

They cannot satisfy that burden. First, the plaintiffs are simply mistaken about the September 30 Order. As described above, it caused no change or modification in Disability "A" criteria but clearly and correctly construed existing criteria. It was made under the clear authority of the Court to interpret the Settlement provisions. It has been a public record in the Court's docket since 1977. No complaints have been heard about the approval of Disability "A" claims in the RSP. And it cannot have caused any diminution in the rate of claims approved in the RSP when the RSP approval rate is used as the standard for measuring the approval rate of claims in the Dow Settlement Facility. At best, the PSC seeks access to the materials to help clarify a purported issue in the Dow Settlement.

B. Principles of Law of the Case and *Stare Decisis* Should Place This Matter at Rest

In *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004), the Eleventh Circuit described the doctrine of *stare decisis* as follows:

> The United States federal legal system is structured as a common law system. This system embodies the rule of stare decisis that "courts should not lightly overrule past decisions ..." . . . because "[s]tability and predictability are essential factors in the proper operation of the rule of law."
>
> The rule of law requires "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."

Id. at 1331 (citations omitted). Although the decision of one judge does not bind another, the earlier decision of a judge is nevertheless entitled to "great weight."

The doctrine of "law of the case" – while theoretically different – nevertheless furthers the same values of repose and finality:

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prerequisites to assertion of a deliberative process privilege are first, that the material is "predecisional," and second, that it is "deliberative." *Id.* at 184; *Schell*, 843 F.2d at 940 ("A document is predecisional when it is 'received by the decisionmaker on the subject of the decision prior to the time the decision is made,' . . . and deliberative when it

> The law of the case doctrine " 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " . . . This doctrine is designed to further important goals vital to just and efficient judicial process, including the provision of an end to litigation, the discouragement of "panel shopping," and the promotion of consistency in rulings between courts. . . . The doctrine does not bar consideration of issues that could have been raised in a prior appeal but were not; however, the doctrine does apply not only as to "matters 'decided explicitly' but also as to those 'decided by necessary implication.' " . . . The law of the case doctrine should guide a court in its discretion to hear subsequent appeals on a particular issue. . . . The doctrine, however, does not limit the court's power to revisit previously decided issues when (1) new and substantially different evidence emerges at a subsequent trial; (2) controlling authority has been rendered that is contrary to the previous decision; or (3) the earlier ruling was clearly erroneous and would work a manifest injustice if implemented.

Klay v. All Defendants, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (citations omitted). These principles of *stare decisis* and law of the case were incorporated into the structure of the RSP. This is why "no other appeals or reviews are permitted," RSP Notice ¶ 34, and why "Judge Andrews's decisions will be final; no appeals or reviews will be permitted from such decisions," Order No. 27L (corrected).

Applying these principles to the September 30 Order and the purported communications involving Judge Andrews and the Claims Administrator or the Claims Administrator and her staff reveals that the meaning of Disability "A" was explicitly the subject of the September 30 Order. Under the analysis set forth in *Klay*, the issue previously decided may be revisited only where "new and substantially different evidence has emerged at a subsequent trial." No such new evidence has emerged here since the September 30, 1997, Order, as we have demonstrated, has been in the Court's and litigants' files for over seven years. Second, there is no "controlling

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'reflects the give-and-take of the consultative process'"). The documents at issue here satisfy both these criteria as well.

authority" contrary to the decision in the September 30 Order. And third, the September 30 Order was correctly decided, as explained above, and fails to satisfy the "clearly erroneous" standard required for revisiting the earlier decision. Finally, there is no "manifest injustice" when RSP claimants cleared the high standard for Disability "A" at twice the rate of those in the Dow settlement. Simply put, the plaintiffs cannot satisfy the standard for revisiting the September 30 Order. It is the law of the case.

CONCLUSION

For the reasons stated, the RSP Defendants respectfully urge the Court to deny plaintiffs' motion to compel confidential Claims Office materials.

Respectfully submitted,

Dated: February 11, 2005

Jerry P. Sattin
Bar Number 84948
Richard M. Eittreim
Bar Number 84963
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
Telephone: (973) 622-4444
Fax: (973) 624-7070
COUNSEL FOR BRISTOL-MYERS SQUIBB COMPANY and MEDICAL ENGINEERING CORP.

Peter W. Morgan
Bar Number 84950
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037
(202) 785-9700
COUNSEL FOR BAXTER HEALTHCARE CORPORATION AND BAXTER INTERNATIONAL INC.

Miles N. Ruthberg
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
(213) 485-1234
COUNSEL FOR 3M COMPANY

William A. Krohley
KELLEY, DRYE & WARREN
101 Park Avenue, 32nd Floor
New York, NY 10178
(212) 808-7800
COUNSEL FOR UNION CARBIDE CHEMICAL & PLASTICS CO. and UNION CARBIDE CORPORATION

Exhibit B

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11/29/00

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Debtor.

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

HON. DENISE PAGE HOOD

_____/

ORDER APPROVING ELIZABETH W. TRACHTE-HUBER AS SUCCESSOR CLAIMS ADMINISTRATOR PURSUANT TO THE SETTLEMENT FACILITY AND FUND DISTRIBUTION AGREEMENT

In accordance with various orders of the MDL 926 Court and the Bankruptcy and District Courts in the Dow Corning Bankruptcy, the Dow Corning Settlement Facility has been pre-funded and the positions of claims administrator and appeals judge and finance committee members have been appointed. The Amended Joint Plan of Reorganization for Dow Corning Corporation, dated February 4, 1999, as amended and modified (the "Plan"), and the Settlement Facility and Fund Distribution Agreement (the "Settlement Facility Agreement"), a subsidiary document incorporated into the Plan, provide for the appointment and supervision of a Claims Administrator to perform certain functions with respect to processing and paying Settling Personal Injury Claims under the Plan. The Plan Proponents have designated Elizabeth W. Trachte-Huber as Claims Administrator, as successor to Mary Katherine Kennedy, and Ms. Trachte-Huber has agreed to accept the appointment and execute a Claims Administrator Employment Agreement (the "Employment Agreement") following this Court's approval of her appointment. Upon the Court's consideration of the Plan, the Settlement Facility Agreement, and the Employment Agreement, it is hereby **ORDERED** that:

1. Pursuant to Article 4.02(a) and (b) of the Settlement Facility Agreement, 11 U.S.C.

§§ 1107(a) and 363(b)(1), and Fed.R.Civ.P. 53, Elizabeth W. Trachte-Huber is approved as the Claims Administrator of the Dow Corning Settlement Facility;

2. The Order dated June 26, 2000 entered by this Court and the Honorable Edwin L. Nelson, MDL 926 United States District Judge, continues in effect until further order of the Court except to the extent the June 26, 2000 Order is inconsistent with this Order;

3. The Proponents and Ms. Trachte-Huber are authorized to execute the Employment Agreement and to perform their respective obligations thereunder;

4. All funds expended by Dow Corning in the performance of the Employment Agreement prior to the Effective Date of the Joint Plan shall be credited against and considered part of the startup and first-year funding obligations of Dow Corning pursuant to the Joint Plan and the Funding Payment Agreement described therein;

5. All actions taken at any time by Elizabeth W. Trachte-Huber as the Claims Administrator (or by any employees or agents engaged by Ms. Trachte-Huber as the Claims Administrator or appointed or hired to perform services in assisting the Claims Administrator) in implementing the Settlement Facility and in collecting, collating, processing, evaluating, and paying claims shall be performed in accordance with the terms of the Plan and the Plan Documents (as defined in the Plan); and

6. The actions described in the preceding paragraph 5 shall constitute judicial actions of this Court and shall be protected, to the maximum extent allowable by law, by the doctrine of

judicial immunity. The relief granted in this paragraph shall be effective from this date until the Claims Administrator resigns or is terminated.

/s/
DENISE PAGE HOOD
United States District Judge

DATED: November 29, 2000

Exhibit 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

ORDER GRANTING MOTION OF DOW CORNING CORPORATION FOR LEAVE TO FILE SUR-REPLY IN FURTHER RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION AND TO MOTION AND BRIEF ADOPTING THE MOTION OF THE CLAIMANTS' ADVISORY COMMITTEE FOR THE DISCLOSURE OF SUBSTANTIVE CRITERIA CREATED, ADOPTED AND/OR BEING APPLIED BY THE SETTLEMENT FACILITY AND REQUEST FOR EXPEDITED CONSIDERATION

The Court has considered the Motion by Dow Corning for Leave to File Sur-Reply in Further Response to Motion Of Claimants' Advisory Committee For Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration And To Motion And Brief Adopting The Motion Of The Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration, and the Court finds and concludes as follows.

1. The Motion is meritorious and should be granted.

2. Dow Corning is granted leave to file its Sur-Reply.

ACCORDINGLY, it is hereby ORDERED that:

1. The Motion is granted in all respects.

2. Dow Corning is granted leave to file the Sur-Reply in Further Response to Motion Of Claimants' Advisory Committee For Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration And To Motion And Brief Adopting The Motion Of The Claimants' Advisory Committee For The Disclosure Of Substantive Criteria Created, Adopted And/Or Being Applied By The Settlement Facility And Request For Expedited Consideration.

_____
Denise Page Hood
United States District Judge

DATED: _____