UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MOTION TO DEEM PRE-1971 SILICONE GEL BREAST IMPLANTS DOW

COMES NOW HOUSSIERE, DURANT & HOUSSIERE, LLP, attorneys representing numerous claimants, moving the Court to deem all silicone gel breast implants received by claimants prior to 1971 Dow breast implants, and in support thereof say:

Under the Amended Joint Plan of Reorganization and related documents, Dow agreed to pay certain claimants certain amounts to settle their claims based upon specified disease categories and disability levels. At the time the Plan was agreed upon, it was uncertain what diseases would be proved were caused by silicone breast implants. Whenever plaintiffs enter into a settlement, they accept the risk that their injuries may prove more severe than thought at the time of settlement, or that developments following the settlement may strengthen their position that their injuries were caused by the defendant. If either event occurs, the plaintiff remains bound by the settlement and cannot receive any additional compensation. The defendants accept the risk that the opposite will occur; and, if it does, the defendant may not recover any of the compensation paid to the plaintiff. The same risks occur at trial when assessing whether future injury will more likely than not occur. These risks are accepted in litigation because of the judicial system's primary function of resolving disputes. If these risks prevented resolution, some lawsuits might not settle for decades, if ever.

Thus, at the time the Plan was entered into, both sides accepted these risks. Even though numerous medical journal articles have now concluded that most of the diseases(except scleroderma) plaintiffs claimed silicone breast implants caused were, in fact, not caused by such breast implants, Dow, as with any settling defendant, accepted the risk of such development when it entered into the Plan. In fact, even today, plaintiffs accept the risk that, as with Agent Orange, new studies will conclude that breast implants do cause certain diseases.

Despite the fair resolution of these claims, with both sides accepting the risks described above, the claims office is now engaging in procedures that deprive claimants of the benefits of the Plan. As we have demonstrated in the above-referenced claims, and will expound upon below, Dow was the only manufacturer of silicone breast implants prior to 1971. Franklin Gerow, MD and Thomas Cronin, MD developed silicone breast implants in Houston, Texas in conjunction with Dow. Dow first implanted silicone breast implants in women in 1964. It was not until 1971 when any other company began manufacturing any other silicone breast implant. Thus, any silicone breast implant placed into a woman prior to 1971 could only have been manufactured by Dow. Despite this undeniable truth, neither the claims office nor Dow will accept responsibility for such implants. Thus, Dow and the Claims Office are denying certain women who received Dow silicone breast prior to 1971 of the benefits of the Plan. Because women who received their breast implants prior to 1971, because of medical record retention policies, find it more difficult to obtain the proof of the identity of their implants. It is clearly unjust and unequal to treat a woman who received her implants after 1971 differently from a woman who clearly received Dow implants prior to 1971. Yet, this is exactly what the claims office is doing.

Dow implied that it would accept the type of proof discussed herein in the following language in the Plan (Paragraph F on Annex A-59)(emphasis added):

> **F. Cooperation.** The Reorganized Dow Corning will cooperate fully with the Claims Office, including the staff members working in the Claims Assistance Program and individual Claimants in providing assistance for and acceptance of manufacturer identification of Dow Corning Breast Implants, including using its best efforts to provide a list of physicians and hospitals to whom Dow Corning sold Breast Implants, listing the time frame of sales to these physicians or hospitals, and providing a list of lot numbers, serial numbers, and any other identifying information about Dow Corning Breast Implants. **The Reorganized Dow Corning will also review, at the request of the Claims Office and/or the Claims Assistance Program, Proof of Manufacturer submissions that do not meet the standard for acceptable proof.**

Despite the clear implication that Dow would accept responsibility for silicone breast implants that they clearly made even when the claimant could not meet the technicalities contained in the Plan, such responsibility has not been accepted. Further, when this office has sought information from the Claims Office about the lists referenced in the aforesaid Paragraph F, we have been told that Dow has not furnished any of such lists.

Our clients have submitted re-reviews (and various other forms of "appeal") clearly demonstrating both that they received their silicone breast implants prior to 1971 and that Dow was the only manufacturer of silicone breast implants prior to 1971.

The Plaintiffs' Steering Committee(PSC) in MDL-926 compiled a history as to when each breast implant manufacturer manufactured silicone breast implants. They compiled this history from discovery responses by each of the manufacturers(answers to interrogatories, documents produced in response to requests for production). MDL-926 was the multidistrict litigation for silicone breast implants federal lawsuits established by the Judicial Panel on Multidistrict Litigation(JPML). The PSC were the plaintiffs' attorneys appointed by Judge Sam Pointer, Jr. Judge Sam Pointer, Jr. was

the federal district judge assigned by the JPML to preside over MDL-926. Thus, the information contained in the attached history came directly from discovery responses of the breast implant manufacturers themselves in MDL-926.

The Breast Implant Product Identification Book (Exhibit A) demonstrates the following:

Bioplasty, Inc. began manufacturing silicone breast implants in 1988(A-1)

Cox-Uphoff, CUI Corporation began manufacturing silicone breast implants in 1975(Exhibit A-2). The Responses of CUI Corporation to Plaintiffs' Master Interrogatories (Exhibit B) demonstrates the same information. Cox-Uphoff Corporation changed its name to CUI Corporation in 1989.

Dow began manufacturing silicone breast implants in 1964(Exhibit A-3 and Exhibit E).

Heyer-Schulte, Schulte Medical Products Polyplastic Silicone Products, American Hospital Supply, American Heyer-Schulte, Baxter began manufacturing silicone breast implants in 1971(Exhibit A-4)(Saline filled breast implants and Natural Y breast implants were first made in 1969. Natural Y breast implants were polyurethane foam covered breast implants [Page 20 in Exhibit C]. None of the implants question were either saline-filled or polyurethane covered). This information is confirmed in Baxter's Responses to Interrogatories (Exhibit C).

McGhan Medical, McGhan Medical/3M, Surgical Products, 3M and McGhan Medical/Inamed began manufacturin silicone breast implants in 1975(Exhibit A-5 and A-6). This information is confirmed in the Response of Defendants McGhan Medical Corporation, Inamed Corporation and Inamed Development Company to Plaintiffs' First Set of Interrogatories(Exhibit D).

Mentor Corporation began manufacturing silicone breast implants in 1985(Exhibit A-7).

Surgitek, Medical Engineering Corporation and Bristol-Myers Squibb began manufacturing silicone breast implants in 1971(Exhibit A-8)(Optiman polyurethane-covered breast implants were first manufactured in 1968. However, none of the implants in question were polyurethane covered). This information is confirmed in Medical Engineering Corporation's Second Amended Answers to Plaintiffs' Interrogatories (Exhibit F).

Based upon the above facts, the undersigned move the Court to deem all silicone gel-filled breast implants received by claimants prior to 1971 to be Dow implants.

WHEREFORE, Movants request an extension of time for filing their Participation Forms; and for such other and further relief to which they show themselves justly entitled to receive.

Respectfully submitted,
HOUSSIERE, DURANT & HOUSSIERE, LLP

By: _____

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Certificate of Service

I HEREBY CERTIFY THAT a duplicate of the foregoing Motion to Deem Pre-1971 Silicone Gel Breast Implants Dow was served upon the following by either hand delivery, facsimile transmission or First Class, United States Mail, on the 5 day of January, 2005.

Debtor's Representatives
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Via Fax (202)962-9290

Claimant's Advisory Committee
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_____
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