UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF MOTION OF CLAIMANTS' ADVISORY COMMITTEE FOR DECLARATORY RELIEF THAT THE "RECEIPT AND RELEASE" DOCUMENT SOLICITED BY THE DOW CORNING LEGAL DEPARMENT FROM UNREPRESENTED CLAIMANTS FROM 1992 – 1995 AS PART OF THE REMOVAL ASSISTANCE PROGRAM (OR REPRESENTED AS PART OF SUCH PROGRAM) IS NOT A GENERAL RELEASE

STATEMENT OF FACTS

1. Dow Corning Solicited Callers To Its "800" Number With Assurances of Financial Aid To Have Implants Removed Without Any Requirement of a Release

In the second half of 1991 and early 1992, media reports of the dangers of silicone gel breast implants were extensive. Jury verdicts against breast implant manufacturers – including Dow Corning – along with inadequate Pre-Market Applications for silicone breast implants, and the release of damaging, internal Dow Corning documents led to an FDA announcement in January 1992 of a moratorium on the sale of silicone gel breast implants. In March 1992, Dow Corning held a press conference and announced that it had created a $10 million dollar fund and a "Removal Assistance Program" to provide financial assistance to women to have their ruptured breast implants removed. *See* Exhibit 3, copy of a March 19, 1992 Dow Corning Press Release ("March 1992 Press Release"). An excerpt from the March 1992 Press Release states:

> Dow Corning today announced it would establish a $10 million fund for breast implant research; provide financial support for removal of implants

> for women who have a medical need for the procedure who cannot afford to pay for it; and announced it would not re-enter the silicone breast implant market worldwide.

Id. In addition, the Press Release goes on to quote the newly appointed C.E.O. of Dow Corning, Keith McKennon:

> McKennon also announced a new program for women who have a medical need to have their Dow Corning implants removed but who cannot afford the necessary surgical procedure.
>
> 'More than any other group,' McKennon explained, 'women in these circumstances would be left without the choice to have their implants removed when a medical need made this procedure necessary. We have now designed a program to help women in that situation.'
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> In explaining the new program, McKennon emphasized the FDA Advisory Panel's recommendation that implants performing satisfactorily need not be removed. As a result, **the new program is limited to women with Dow Corning implants 'who have agreed with their physician that, for medical reasons, her implant(s) need be removed, but who cannot afford the procedure.** For such patients, we will provide up to $1200 to support the medical costs of the removal procedure,' said McKennon.
>
> Patients with Dow Corning implants who believe they qualify for the program can call the company's Breast Implant Information Center at 1-800-442-5442 to find
> out more information about the program.

Id. McKennon had worked with consumer advocate and implantee, Sybil Niden Goldrich, in early 1992 to establish the program. Mrs. Goldrich states in her affidavit that McKennon assured her as the C.E.O. of Dow Corning that "no woman would have to give up any of her legal rights" and that "Dow Corning would not ask for a release from any woman." *See* Exhibit 7 attached hereto at ¶ 6, Affidavit of Sybil Niden Goldrich. Further, she states that, "This was a key point of our discussions." *Id.* Mrs. Goldrich was provided with a draft of Dow Corning's press release (*see* Exhibit 7A) and document outlining the Removal Assistance Program (*see* Exhibit 7C[1]) and

[1] Dow Corning's draft outline of the Removal Assistance Program states that, "Participation in this program will not require a release of your potential claims against Dow Corning, other than those potential claims, if any,

noted language in it that suggested that there would be an offset in a woman's recovery based on the amount they received from the Removal Assistance Program. *Id.* at ¶ 7. She contacted McKennon about this and he again assured her that he would remove the requirement of a release. *Id.*

Despite McKennon's private assurances to Mrs. Goldrich, women who called the "800" number were told that to receive financial assistance for explantation, Dow Corning required a limited release for the cost of the surgery.[2] *See* Exhibit 13 attached hereto, Affidavits of [redacted] and Dianna P. McBride, which were originally obtained and attached to a motion seeking a temporary restraining order against Dow Corning in the certified *Dante* class action, *In re: Breast Implant Litigation*, Master File No. C-1-92-057, filed on March 20, 1992. A preliminary injunction against the Removal Assistance Program was obtained against Dow Corning on March 20, 1992 in the *Dante* class action, but this was later lifted based on Dow Corning's assurances to the District Court that it would not seek a release for women who desired financial assistance with the explant surgery. *See* Exhibit 4 attached hereto, Transcript of March 27, 1992 Hearing, *In re Breast Implant Litigation*, Civil No. C-1-92-057. Dow Corning's attorney stated:

> With regard to the removal program which we recently implemented, there is absolutely no release required, mentioned or whatever ... there is an informed consent form which the doctor could use to inform the patient about the surgery ... but **there is no release. We haven't asked for a**

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relating to the removal operation." *See* Exhibit 7C. The final version of the outline is identical except that it is dated March 17, 1992 and was later Bates stamped as M-690032 – 690033 when it was produced in the MDL-926 litigation. *See* Exhibit 5 attached hereto. The next version of this document that the CAC located is dated March 29, 1993 (*see* Exhibit 8), and the only modification that the CAC could determine was that Dow Corning deleted the language that provided that claimants would be releasing any rights. The 1993 version states, "Participation in this program will not require a release of your potential claims against Dow Corning." *See* Exhibit 8 at ¶ D.

[2] *See* Exhibit 5, M 000690032 – 00069033, "Dow Corning Breast Implant Removal Assistance Program" outline dated March 17, 1992. The guideline states, "Participation in this program will not require a release of your potential claims against Dow Corning, other than those potential claims, if any, relating to the removal operation."

> **release.** I mean, in all candor, given the present climate and given the FDA and everything else, we determined that we would not ask for a release.

Id. at 16-17 (emphasis added). The District Court observed that while Dow Corning was free to seek releases from claimants if it did so openly, it cautioned that any release obtained in misleading circumstances would be unenforceable: "If, in fact what occurs is that these people have been misled, that release isn't worth the paper it's printed on . . . ." *Id.* at p. 15.

At a training session for Dow Corning's "Implant Hotline Program" from March 25 – 27, 1992, just days before the March 27, 1992 hearing in *Dante*, Dow Corning paralegal, Paulette Williams, was recorded in the following exchange with other trainers and trainees:

> WOMAN: What will happen if Reuben [refers to U.S. District Court Chief Judge Rubin] doesn't, we can't open up the hot lines. What happens?
>
> MAN: Good question. I think they would have to shut down the program and I think there would probably be some consideration of an appeal. Especially, **in light of the fact that we are not releasing them and they can still be part of the class.** If it is made clear to Reuben [sic], a release, he may say we can't even release them for the surgery. And my guess, although I don't know and I am not speaking for the Company right now, my guess is that if that was the case we wouldn't have any release for the surgery that still would go at 1200 bucks.
>
> PAULETTE: They have taken that out Jim.
>
> MAN: **Oh so there's no more release?**
>
> PAULETTE: **There is no more release for the surgery, there is nothing.**

See Exhibit 6 attached hereto, DCC 242120572 – 242120720, at DCC 242120597 (emphasis added).

Documents produced by Dow Corning that describe the Removal Assistance Program conform to the agreement reached during the *Dante* hearing in March 1992. *See* Exhibit 8

attached hereto, DCC 274020035 – 274020036, outline of the "Dow Corning Breast Implant Removal Assistance Program dated March 29, 1993. The 1993 outline states that:

> Dow Corning agrees to pay up to $1,200 of the medical expenses directly related to removal surgery that are not covered by insurance. This program is not intended to cover costs related to breast implant replacement. **Participation in this program will not require a release of your potential claims against Dow Corning.**[3]

Id. at § D (emphasis added). It also indicates that claimants can contact Dow Corning at 1-800-442-5442, the same toll free number that is listed in the March 1992 Press Release, and describes the process that will be followed when women call for explant assistance. There is no mention that callers may be transferred to any other department within Dow Corning, particularly the Legal Department where releases will be sought.

2. Dow Corning Targeted The Most Financially Desperate Women Who Had A Medical Need To Have The Implants Removed And Who Had No Option To Accomplish This Without Dow Corning's Offer of Financial Assistance

As noted above, the intense media attention that focused on the dangers of silicone gel breast implants in late 1991 and early 1992 caused many women to consult with their plastic surgeon about the condition of their breast implants. Dow Corning had represented that breast implants would last a lifetime. *See, e.g.,* Exhibit 16 attached hereto, M 650012 – 650019 at M 650014, Dow Corning brochure entitled "Facts You Should Know" dated 1976, that states "Based on laboratory findings and human experiences to date, a gel-filled breast implant should last a lifetime." It came as a cruel surprise for many women in 1992 to discover that their gel-filled implants had ruptured and needed to be removed, but that they could not afford the costs of the corrective surgery.

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[3] The language that women will be asked to release Dow Corning for the costs of the corrective surgery that was in the March 17, 1992 version of this document (Exhibit 5) was removed.

Based on over 30 years experience in the implant business, Dow Corning was aware that explant surgery for ruptured gel implants cost generally from $3,000 to $20,000 depending on the severity of the rupture and whether it required breast reconstruction. Yet, when the Legal Department devised the Removal Assistance Program in early 1992, it purposefully limited the explant payment to a meager $1,200, half of what its insurance carriers had authorized it to negotiate for a decade earlier. [4] Mrs. Goldrich states in her affidavit that she requested McKennon to raise the explant assistance payment, but he responded that Dow Corning could not afford to pay each woman more than $1,200. *See* Exhibit 7 at ¶¶ 4-5 and 9. As documented herein, Dow Corning could and did pay women more than $1,200 for explant surgery, but did so only after switching them to their release program.

Further, Dow Corning's offer of monetary assistance was made to the most financially desperate and medically vulnerable group of implanted women. A draft of the March 1992 Press Release was retained by Sybil Niden Goldrich (but was not produced by Dow Corning) and reveals Dow Corning's intent to target financially distressed and emotionally vulnerable women. *See* Exhibit 7 at ¶ 8. In the draft document, McKennon states:

> Since my first day on my new job, I've been concerned about any woman with Dow Corning implants who has no money, and no insurance coverage, but who needs an implant removal procedure. **More than any other group, women in these circumstances would be left without the choice to have their implants removed when a medical need made this procedure necessary. We have now designed a program to help women in that situation. ...**
>
> The new program I an announcing today will be limited to patients with Dow Corning implants who have agreed with their physician that, for medical reasons, her implant(s) need be removed, but who cannot afford the procedure. For such patients, we will provide up to $1200 to support the medical costs of the removal procedure.

[4] For example, they had agreed in the early 1980s with their insurance carrier to allow Dow Corning attorneys to negotiate claims for under $2,500 for bodily injury. *See* Exhibit 10 at DCC 242060428.

Id. (emphasis added). As noted above, "More than any other group" of women, Dow Corning targeted the most financially distressed. *Id.*

Dow Corning coupled the announcement of the Removal Assistance Program with news of a $10 million fund, causing further confusion by implanted women that there was a significant fund of money available to assist women with the costs of the implant removal surgery. *See* Exhibit 3 attached hereto, March 19, 1992 Dow Corning Press Release ("March 1992 Press Release"). Dow Corning publicized its offer of financial assistance in a national advertising campaign. Indeed, comments from Dow Corning paralegal, Paulette Williams, in a training session indicate that Dow Corning was deliberately attempting to solicit women to call them instead of attorneys who could advise them of their rights. She stated:

> In November, the American Trial Lawyers Association put out an ad in several newspapers, if you have implants and you would like to sue call this 800 number. So, Dow Corning counteracted that by putting out an ad in 23 major papers across the country. If you would like current accurate information about breast implants, call this 800 number which was our Center number. We took 1500 calls in two days on that number.

See Exhibit 6 attached hereto at DCC 242120605.

It was inevitable – indeed, predictable and intended – that the most financially desperate women targeted by Dow Corning would call and ask how they were supposed to pay for the surgical costs above $1,200, particularly given the simultaneous announcement that a fund of $10 million was being created by Dow Corning. By Dow Corning's own admissions, it knew these women were frightened and "not thinking logically,"[5] that they could not afford to have

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[5] At the Implant Hotline Program Training Session held from March 25-27, 1992, Dow Corning paralegal Paulette Williams states, "Women are really scarred [sic – scared]. Not thinking logically. Not ready to die. Media has blown this to where any normal person would be afraid." *See* Exhibit 6 at DCC 242120718. She urged trainees that they should "come across as confident" and to convey to women who called that "we are in this together." *Id.* at DCC 242120720.

surgery without Dow Corning's offer of assistance, and that they had a medical need to have the ruptured gel implants removed.[6] Yet Dow Corning used their very questioning of the amount available to pay or defray the costs of the surgery as the trigger for Implant Information Center representatives to steer women to its Legal Department, without full disclosure to the women that this was what they were doing.[7] There, lured by the promise of full payment to the doctor "for the costs of the corrective surgery," Dow Corning's trained paralegals induced claimants to sign a "Receipt and Release" without full informed consent or disclosure and under circumstances that make enforcement of the release unconscionable, as more fully described herein.

3. Despite Its Public Pronouncements, Privately, Dow Corning Used Its Implant Information Center As Part of Its Legal Defense and Strategy To Reduce Its Liability For Breast Implant Litigation

Despite its representations to the United States District Court that certified the *Dante* class that no release would be required for women who wanted financial assistance with removing defective breast implants, Dow Corning privately devised a release program as part of its defense strategy. Dow Corning promoted one toll free number for its "Implant Information Center" but used this "800" number to handle calls both for its removal program (where no release was required) and its claims release program (where a release was required).[8] Callers

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[6] *See* Exhibit 9 attached hereto, DCC 242120739 – 242120748, at DCC 242120746 ¶ 43 (Rupture), excerpts from form letter paragraphs prepared by Dow Corning. With regard to rupture, it provides, "If you suspect that you have a ruptured implant, Dow Corning recommends that you consult your physician. If the rupture is confirmed, prompt surgery is recommended to remove the implant."

[7] At the same training session noted in footnote 6 above, Dow Corning paralegal Paulette Williams stated, "When you determine at whatever point, that this is a call that really belongs to the other group, the program group, is when you will then do your transfer by, and I'll show you how to transfer on this equipment to 8875. So if you get calls that go to the other group you will transfer them over. Okay?" *See* Exhibit 6 at DCC 242120678.

[8] Dow Corning paralegal Paulette Williams informed trainees for the Implant Hotline Program that, "All calls will be coming in on the 800 number and you will be the receiver of all calls. You will have initial contact with the call." *See* Exhibit 6 at DCC 242120678.

did not know or understand that there were different programs with different payment amounts and consequences. Apparently, trainees also had a difficult time understanding the difference, as evidenced by the following exchange at a training session held in March 1992. Dow Corning paralegal Paulette Williams instructed trainees to transfer women who called the Implant Information Center to Dow Corning paralegals in the Legal Department. She states:

> Once you know whose implants they have and that they are Dow Corning and someone is paying for all of this stuff, **then what you need to say is I need to get you to Customer Relations and I have an 800 number for you to call and you need to ask for Shelly Blair, Rosalyn Wakefield, Lynn Debolt [Dow Corning paralegals in the Legal Department], these are on the list.** Lynns' name should be given last, she is going to law school, she is only in the office part time, 2 ½ hours a day.... As a matter of fact, Rosalyn could even be first, she is the newest in the paralegal family. So she has less case loads than any one else so give them to her first.

See Exhibit 6 at DCC 242120667 (emphasis added).[9] There is then a break in the transcript of the recording as the tape is changed, and it picks up:

> WOMAN: So the reason we are sending them down to Customer Relations, if they are hostile, if someone is going to pay ...
>
> PAULETTE: The **reason we are sending them to Customer Relations actually is that if we deal with them as a claim and we can satisfy all parties, then we avoid litigation. ...**

See Exhibit 6 at DCC 242120668 (emphasis added).

Further, the training session is revealing in that it documents that the Implant Information Center was actually an arm of litigation and a "pipeline into the claims" for the defendants. An exchange at the training session states:

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[9] A Dow Corning Resource List identifies all of these individuals as paralegals in the Dow Corning Legal Department. *See* Exhibit 25 attached hereto, DCC 242060418 – 242060425, at DCC 242060425. Shelly Blair and Rosalyn Wakefield were in the Memphis Claims Office, *id.*, and were considered part of Legal. *Id.* at DCC 242060419. Lynn Debolt [Diebold] is also part of Legal. *Id.*

> WOMAN: How did the Implant Information Center come into this then because we are not to be talking to claimant's attorneys (clients).
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> MAN: **They are treating that as almost an arm of litigation so that the defendants and defendants attorneys are in essence can almost have a pipeline into the claims, where the claims are represented by counsel.** That's probably a bigger issue now then the 1200 Dollars. We'll see what happens on Friday. I would guess that they will probably will [sic] allow that. I don't know what he'll do with Lynne and Shelly with the claims that are processed down there [referring to the Dow Corning paralegals]. That's a touchier issue because we could get releases as soon as we can (undiscernible).

See Exhibit 6 at DCC 242120597 (emphasis added).[10]

4. Dow Corning Hired Temporary, Untrained Workers As Its RAP Representatives And Transferred Women Who Called To Paralegals Renamed In 1992 As "Customer Relations Specialists"

The Implant Information Center housed several units of Dow Corning's litigation-team: one unit was actually referred to as the "Removal group," but it consisted of "six month temporary help" who were deliberately not trained or provided with any information about silicone breast implants. *See* Exhibit 6 at DCC 242120607. Dow Corning paralegal Paulette Williams made the following comments to trainees about Removal Assistance Program operators:

> **They are not trained, they cannot answer questions in the Removal Program, they are very limited, their scope of knowledge has been limited on purpose, we do not want them to talk about complications, we do not want them to know those answers because that is the Implant Centers' job and these are the people, you are the people trained to deal with the situation. These are six month temporary jobs, we do not feel that they really need to get into those, the Implant Center will handle that. ... And it is not always easy to take those calls but someone has to handle them and it is not the Removal**

[10] At the time of the hearing in *Dante* in 1992, class counsel was not aware how calls were transferred between Dow Corning's Implant Information Center and its Legal Department. This was not disclosed or made clear, and the information is only now coming to light as a result of the releases Dow Corning has asserted against certain Settling Breast Implant Claimants.

> **people, they are not trained to do that. So we don't allow them to do that."**

Id. (emphasis added).

The second claims unit within the Implant Information Center was, in sharp contrast, staffed by experienced Dow Corning paralegals that were required to have either a B.A. or B.S. degree and a paralegal certificate or two years of paralegal experience. *See* Exhibit 11, DCC 242060859 – 242060860, Position Description for a Customer Relations Specialist for Plastic Surgery Products. In addition, Dow Corning required its paralegals to have strong written and oral communication skills, to assess significant impact on all aspects of Dow Corning's business, and to develop responses necessary to the company's defense. *Id.* at DCC 242060859. In addition, "The ability to handle emotionally charged situations in a professional manner is key." *Id.*

In contrast to the untrained RAP representatives, paralegals and Implant Information Center staff underwent "extensive training by top technical people," [11] and were trained on a variety of legal issues including how to maintain and protect Dow Corning's legal privileges when they spoke or corresponded with unrepresented claimants[12] and obtaining information to use in the ongoing litigation and defense of breast implant cases.[13]

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[11] Dow Corning paralegal Paulette Williams stated to trainees that, "**[A]gain you are coming into this call with a lot more knowledge than this person on the other end and she is scared for a reason. She is scared because she doesn't know all of those things.**" *See* Exhibit 6 at DCC 242120702 (emphasis added). Further, "PAULETTE: One of the things I need to tell you is that when somebody asks you, 'what kind of training have you been through?' **The answer to that is that you have been through extensive training by top technical people in the corporation.**" *Id.* at DCC 24212710.

[12] *See* Exhibit 6 at DCC 242120590 – 242120597.

[13] While the Implant Information Center was touted as a way for women and doctors to get accurate information, Dow Corning documents reveal that their paralegals were trained to find out as much about the claimant's medical history as possible. "Those are things we want to find out. Prior medical history. These are things we want to know. If at some point this turns into a claim, or this turns into litigation. We would want to know that this women stated that this is her family history. These things run in her family, we need to know that." *See* Exhibit 6 at DCC 242120576.

When the Removal Assistance Program was developed in 1992, Dow Corning renamed its paralegals as "Customer Relations Specialists."[14] *See, e.g.,* Exhibit 26 attached hereto, DCC 242060877 – 242060879, Position Description for Customer Relations Manager dated May 27, 1992. Despite the misleading name, the paralegals reported to insurance carriers, the Legal Department, and executive management. *See* Exhibit 11, ("Report appropriately to insurance carrier, Legal Department, product manager, executive management and manufacturing plant (for GMP and MDR compliance.")). In fact, the Customer Relations Manager did a weekly report on claims resolved to the highest levels within the company – to Keith McKennon, who was the CEO of Dow Corning, and Jim Jenkins, who was Dow Corning's General Counsel. *See* Exhibit 12 attached hereto, DCC 242060925. As noted above, McKennon had publicly promoted the Removal Assistance Program in the March 1992 Press Release and had worked with Sybil Niden Goldrich to establish a no-release program. Despite his assurances that releases would not be required, he undoubtedly had direct knowledge that releases were being solicited inasmuch as he was one of the primary recipients of the weekly claims report on released claims from Lynn Diebold of the Dow Corning Legal Department. The claims report detailed new claims received, the number of claims resolved, the number of claims awaiting reimbursement by insurance carriers, and the average number of claims resolved per paralegal. *Id.*

Moreover, an internal Dow Corning memo to Dow Corning paralegal Paulette Williams dated just one week after the Removal Assistance Program began states that "Per Keith's [McKennon] instruction, the following is an update on removal activity and feedback on what

[14] The Position Descriptions were written by Lynn Diebold, an attorney at Dow Corning, and are marked "Attorney Work Product." The CAC believes that these documents were originally listed on Dow Corning's privilege log in the MDL-926 litigation but were removed and produced to the National Depository after court review.

patients and callers are saying about the program." *See* Exhibit 28 attached hereto, DCC 01000336 – 010003367, Memo from Bridget Snow to Paulette Williams dated April 3, 1992. The memo reports that "Numerous callers have expressed dire financial and medical circumstances" and that:

> The large majority of callers openly stated $1200 doesn't come close to paying for costs. Patients quote fees ranging between $2400 – 6000. Program Reps estimate less than 20% of the callers are irate. This small group is substantially augmentation patients and they state DC should pay for ALL medical costs.

Id. at DCC 010003366. Despite its awareness that $1,200 was woefully inadequate to pay for the medically needed explant surgery, Dow Corning did not increase the amount of money payable to these women, but instead, transferred them to its release program.

Customer Relations Specialists used standard form letters approved by the Dow Corning Legal Department when they corresponded with unrepresented claimants. The letterhead and body of the letter contained no references to the fact that they were from the Legal Department or that the claimant was dealing with a paralegal whose job it was to secure a release on behalf of Dow Corning. The form letter referred to the Removal Assistance Program and stated that this was available only if the removal was medically necessary or the claimant was financially unable to pay. If those criteria didn't apply or the claimant was dissatisfied with the $1,200 payment, then claimants were told that they could "file a claim with my office." *See* Exhibit 14 attached hereto, DCC 242060913, form letter to claimants who contacted the Removal Assistance Program and were then transferred to the claims removal program. Since the letter was from Dow Corning Wright, the claimant had no way to understand that the reference to "my office" was really to "the Legal Department." Claimants who wanted to file a claim were told that "If it appears that your implant failed as a result of our materials or workmanship, we will assume

financial responsibility for your reasonable, uninsured out-of-pocket expenses. Prior to making any claim payment, we would require you to sign a release." The entire letter addresses only the issue of explantation.[15] There is no reference to any other claim the claimant might have or could assert for rupture, disease, scarring and disfigurement, or other injuries.

The form letter then requests the caller to sign a Medical Authorization Form, but limits it to "the names of the doctors who have treated your breasts." *Id.* It does not ask for information on doctors who treated the caller for any other problem other than for the explant surgery. The form letter closes with the reference to the enclosure of a Patient Information Booklet on breast implants and instructs the claimant, "If I can answer any questions about our Removal Assistance Program or our claims process, please do not hesitate to call me at 1-800-238-7188." *Id.*

Significantly, the two explant assistance programs within Dow Corning used the identical intake form for calls: the Removal Assistance Program called the form the "Breast Implant Removal Assistance Program Application" while the claims program called the form "Claim Report Form." Other than the name difference, the forms are identical and the claims for explant assistance were treated the same way. The only difference was the amount paid for the explant surgery. *Compare* Exhibit 15 attached hereto, DCC 050242294 (Removal Assistance) with DCC 001004288 and DCC 242060976 (the claim program).

5. Customer Relations Specialists Were Considered Dow Corning's First Line of Defense for Breast Implant Litigation

Paralegals – aka "Customer Relations Specialists" -- were instructed to refer to their role as "claims" instead of litigation or legal department. Dow Corning paralegal, Paulette Williams,

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[15] *See* Exhibit 14, DCC 242060913. For example, claimants were instructed to complete the Medical Authorization Form for only doctors who treated a claimant's breasts.

stated at the 1992 training session that, "Claims is referred to as Customer Relations." *See* Exhibit 6 at DCC 242120575. Customer Relations Specialists were viewed internally as Dow Corning's first line of defense for litigation. A telling handwritten outline from what appears to be a training program states that the "Theory Behind Claims" was "to set up a defense strategy for the legal department." *See* Exhibit 10 attached hereto, DCC 242060428 - 242060429. Customer Relations Specialists were instructed to gather information such as family medical histories from claimants for the Legal Department,[16] provide litigation support to the Legal Department,[17] develop and recommend strategies to mitigate damages, and apply legal theory and defense strategies to resolve claims. *Id.* All correspondence from Customer Relation Specialists and Implant Information Center representatives was required to go through the Legal Department.[18] *See* Exhibit 6 at DCC 242120603. Specialists were also provided with form letters to send to claimants and doctors that were pre-approved and/or prepared by the Legal Department,[19] but which were carefully designed so that all references to the fact that they were generated from the Legal Department were removed. However, internally, returned correspondence from claimants and doctors was received and date stamped with the Dow Corning Legal Department logo. *See* Exhibit 29 at DCC 096301962.

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16 *See* Footnote 10.

17 *See* Exhibit 11, DCC 242060859 – 242060860, at ¶ 8, "Provide litigation support to the Dow Corning Legal Department as requested and as time permits."

18 Paulette Williams instructed trainees that, "All letters must be cleared through me preferably, if I am not there then through Wendy [Bott] or Dawn [Bartell] [part of Dow Corning Legal]. The reason for that is my background is legal. That is what my education is in and that is what I do. We want to make sure that everything that goes out is legally correct, we don't have a problem there." *See* Exhibit 6 at DCC 242120604.

19 *See, e.g.*, Exhibit 14, DCC 242060913, Copy of redacted letter from Dow Corning paralegal, Shelly Blair, stamped "Attorney Work Product" at the top.

6. Dow Corning Claims Paralegals Are Given Incentives To Settle Claims Diverted To Them Through The Implant Information Center's "800" Number

Customer Relations Specialists / paralegals were told to use "Creative reasoning and presentation" to reach a result beneficial to Dow Corning. *See* Exhibit 11 at DCC 242060860. The Position Description provides:

> This position requires the application of legal theory and defense strategies to make independent judgements [sic] on appropriate resolution and/or referral of claims. Each claim must be individually evaluated in light of personalities involved, product at issue, business impact and precedent-setting value. **Creative reasoning and presentation must be employed to reach a 'win-win' resolution.**

Id. (emphasis added).

The Position Description made it apparent that Customer Relations Specialists were under significant corporate pressure to obtain as many releases as possible for as little as possible – indeed, the paralegal's compensation was dependent on this. Under the heading "Accountability" it states:

> This position is accountable for cost-effectiveness of the first level claims handling process and for preserving a strong working relationship with physician, patient, and hospital customers. **Successful management of this role has a direct impact on the company's bottom line profits and on the cost of product liability insurance. A measurable reduction in healthcare product litigation and its associated costs is the expected result.**

Id. (emphasis added).

Paralegal supervisors – retitled in 1992 as well to "Customer Relations Supervisors" – were charged with "distribution of claims to paralegal staff." *See* Exhibit 17 attached hereto, DCC 242060874 – 242060876. They were required to "Review all active files with each Senior Customer Relations Specialist every thirty (30) days to assure responses are consistent with corporate defense strategy," *id.*, and were told that, **"Productivity is judged by both the number of claims resolved and the dollar volume of claims on an annual basis."** *Id.*

(emphasis added). Senior paralegals were expected to handled 100 claims at any given time. *See* Exhibit 27 attached hereto, DCC 242060871 – 242060873.

Customer Relations Specialists were rewarded according to the Hay schedule and Hay Points[20]. Handwritten notes that appear to be of a paralegal trainee note that, "Job description compared to Hay scale develops salary. Range along with education & experience. **Claim settlement abilities will effect HAY Points.**" *See* Exhibit 18 attached hereto, DCC 242060416 – 242060417. Thus, it was made clear to claims paralegals that the more claims they could resolve, the more HAY Points they would earn, thus resulting in higher salary and/or bonuses.

7. Dow Corning Induced Explanting Plastic Surgeons To Obtain Releases For Dow Corning In Exchange For Paying All of The Surgeons' Expenses

Dow Corning established a different "800" number for physicians[21] and provided information to them that was not provided to claimants. Plastic surgeons who contacted Dow Corning were offered full payment for their fees if they were able to obtain a signed release, provided by Dow Corning to the doctor, from the doctor's patient. If the doctor was not able to secure the signature on the release, then Dow Corning informed the surgeon that they would pay only $1,200 of the doctor's fees. In virtually all cases, the patient received no compensation from Dow Corning. The entire payment was made to the physician.

Dow Corning also referred to the claim as belonging to the doctor, not the claimant. For example, one of the form letters to doctors informed doctors how to initiate a claim for payment

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[20] The Hay Guide Chart-Profile Method of Job Evaluation (referred to as Hay Points), is a job evaluation system that uses three factors to evaluate an employee's performance. The three factors are "know-how," problem solving and accountability. The more HAY Points an employee earns, the higher their performance review and salary/bonus. See, e.g., Exhibit 19 attached hereto.

[21] *See* Exhibit 7B attached hereto, Affidavit of Sybil Niden Goldrich, and attached document authored by Dow Corning entitled "Questions and Answers On Dow Corning's Continuing Commitment To Patients And Physicians" at Question 11, page 3. Women with implants were instructed to call the Implant Information Center number: 800-442-5442, while doctors were instructed to call 800-437-7056.

to be made to the doctor. The letter states, "**If you wish to initiate a claim** we will need to obtain the removed sterilized implant, original and revision operative reports, and documentation of the out-of-pocket expenses." *See* Exhibit 29 at DCC 096301963 (emphasis added). It is clear from this correspondence that Dow Corning viewed the claim as the doctor's and requested that the doctor document his or her expenses. There is no reference to communicating the information to the patient or asking about other injuries or expenses the patient may have incurred. If the patient asked questions, Dow Corning instructed the physician to provide her with the "800" number for its Implant Information Center to ask for a Patient Information Booklet. *Id.* at DCC 096301963. In this way, the doctor was used as an agent of Dow Corning to transmit documents for signature on Dow Corning's behalf including not only the "Receipt and Release" document but other forms authorizing Dow Corning access to the patient's medical records and information. *Id.* Meanwhile, Dow Corning provided the physician with direct access to its claims department via a private "800" number. *Id.*

In at least one instance, the doctor expressed his confusion about the different programs and the understanding he thought he had with Dow Corning about payment of his fees. *See* Exhibit 30 attached hereto, letter from Dr. Bruce Neu to Gene Jakubczak of Dow Corning dated September 1, 1992. After the explant surgery occurred, Dr. Neu states that he received a letter from a Customer Relations Specialist at Dow Corning stating that he would have to obtain a release from his payment to recover his surgical fees. *Id.* He states that he is attempting to have his patient sign the Dow Corning release document but feels that "the agreement which we struck was that you would reimburse us $2,000 for the cost of the implants and operating room facility. If this is not your recollection, or you disagree with this, please respond as soon as possible so we can bring this matter to as rapid a conclusion as possible." *Id.* Approximately six months

later, the claimant received a handwritten letter from Dr. Neu's bookkeeper asking her to sign the enclosed document stating, "This needs to be done so Dr. Neu can be paid by Dow Corning." *See* Exhibit 31 attached hereto, April 26, 1993 Letter from Andrea Brown to the patient in question. The claimant signed the document, more than a year after her explant surgery, and, although the check was made jointly payable to Dr. Neu and her, Dr. Neu received all of the compensation ($2,000).

Similarly, women who called the Implant Information Center were instructed to talk to their surgeon and call back. *See* Exhibit 6 at DCC 242120715. Dow Corning paralegal Paulette Williams candidly explained to trainees the rationale for this: "Bringing the physician into it, cuts her off. She can't go on with it, because she is just supposing at this point. She doesn't know what is going to happen." *Id.*

8. The Dow Corning Legal Department Devised A Short 2-Sentence "Receipt and Release" For Unrepresented Claimants Who Requested Explant Assistance

Customer Relations Specialists used a short, two-sentence "Receipt and Release" document with unrepresented claimants who sought explant assistance. The "Receipt and Release" asked claimants to acknowledge receipt of the payment for the costs of the explant surgery ("acknowledge the receipt and sufficiency of $[amount] paid to me or on my behalf") in exchange for releasing Dow Corning from claims arising from the "use of the breast implant product...." The second sentence then modifies and limits the release as follows, "This release is in settlement of a dispute as to the circumstances and cause of the corrective surgery on [DATE]."

Significantly, key words that would have triggered questions from claimants -- such as litigation, participating in the certified class action, rupture, scarring, contracture, injuries, medical conditions or diseases, autoimmune, settlement, demands, damages, actions, suits or

causes of action, liquidated or unliquidated, barred, "General Release," etc., were omitted in the "Receipt and Release" and in all correspondence with the claimant and her doctor. Although the "Receipt and Release" required a single witness for the claimant's signature, it was not required to be notarized.

Given all of the circumstances described herein, it was reasonable for women to conclude that the "Receipt and Release" document was a release of their claim "relating to the removal operation" as described in the "Dow Corning Breast Implant Removal Assistance Program" outline. *See* Exhibit 5.

In addition, the short "Receipt and Release" document appears to be a deviation from standard "general release" and "settlement agreements" Dow Corning used when settling claims of represented claimants who litigated against it and with lengthier, more detailed releases that it used when settling other breast implant claims[22]. For example, Dow Corning reached a settlement regarding a 1983 lawsuit filed against it. *See* Exhibit 20 attached hereto, 4/22/1983 FULL AND FINAL RELEASE (redacted). The document is entitled "FULL AND FINAL RELEASE," specifically includes language that releases Dow Corning "from all liability, claims and causes of action of every kind in any way arising out of, or in any way connected with, the subject matter of the complaint ...." *Id.* It also states that "this release describes the entirety of our agreement with the parties released; that we understand this to be a full, final and complete release of all our rights against them ...." *Id.*

The two-sentence "Receipt and Release" also appears to be a deviation from prior release documents Dow Corning used with unrepresented claimants. *See* Exhibit 21 attached hereto,

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[22] *See, e.g.,* Exhibit 32 attached hereto, an example of a lengthier "General Release" used to resolve some California claims, and Exhibits 33A and 33B attached hereto, two versions of Florida release documents – the first entitled "Release and Settlement Agreement" and the second entitled "Settlement Agreement and General Release."

11/18/1982 RELEASE (redacted). It also includes language that is not included in the "Receipt and Release" used for explant assistance in 1992. It states that the undersigned releases "demands and action of every kind and nature whatsoever heretofore or hereafter sustained or received" by reason of the purchase and use of the Dow Corning breast implant, and that Dow Corning does not admit any liability by giving the payment "and that payment is given to fully settle and discharge a disputed claim." *Id.* The 1982 Release is also notarized, which was not required of the "Receipt and Release" document used for explant assistance.

It also appears that Dow Corning paralegals were instructed to use lengthier, more detailed releases of general damages when negotiating with represented claimants, when the payment amount for an unrepresented claimant was either significantly higher[23] (suggesting that it was a release of more than explant assistance) or when Dow Corning attempted to circumvent the language in the original global settlement agreement that allowed claimants who settled for under $15,000 to participate therein.[24] In fact, Dow Corning expressly informed attorneys

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[23] *See, e.g.,* Exhibit 22 attached hereto, 12/19/1993 "SETTLEMENT AGREEMENT AND GENERAL RELEASE" (redacted). The "General Release" is for $33,000 and notes that it is "in settlement of all claims raised by CLAIMANT" and that she "hereby releases, acquits, forever discharges, covenant not to sue, and covenant to hold harmless 'DCC' ... of and from any and all claims, demands, damages, actions, suits or causes of action, including, but not limited to, any and all claims actually asserted and any and all claims, liabilities, known or unknown, liquidated or unliquidated, whatsoever in law or equity now existing or which may hereafter accrue against DOW CORNING CORPORATION arising only from the above described occurrence involving Dow Corning Breast Implants." *Id.* Dow Corning also required this "General Release" to be notarized. *Id.*

[24] *See, e.g.,* Exhibit 34 attached hereto, 12/9/1994 "REVISED GENERAL RELEASE." This release document is interesting because it is identical to the "Receipt and Release" document at issue in this motion, but it has been re-titled as "Revised General Release." This demonstrates that Dow Corning was deliberately attempting to circumvent the language in the global settlement signed in March 1994, [redacted] v. Dow Corning Corporation, Case No. CV-94-P-11558-S ("[redacted] global settlement"). Section VI(B) of the [redacted] global settlement provided that unrepresented claimants who settled their breast implant claim for less than $15,000 would be eligible to participate in the settlement. *Id.* This language was later clarified by Chief Judge Sam C. Pointer in the Class Notice to provide that these claimants could participate only if the release was not a "general release." The CAC has only recently learned that Dow Corning apparently attempted to circumvent its agreement in the [redacted] original global because it thereafter changed the title of the "Receipt and Release" document it had been using with unrepresented claimants to "Revised General Release." This issue, exempted from the Release Dispute Procedures in Exhibit 1 hereto, will be addressed in a separate motion to be filed by the Claimants' Advisory Committee.

representing claimants that "We would be willing to consider a claim for general damages." *See* Exhibit 23 attached hereto, DCC 242060917.

Since the lengthier, more detailed general release documents were available and were being used by Dow Corning, it is, at a minimum, puzzling why Dow Corning would use the short, simple "Receipt and Release" document for unrepresented claimants who called about explant assistance, and why in these cases no written documentation exists that mentions claims for any injuries a caller might have other than for the costs of the corrective surgery or that suggests that callers contact class counsel or seek legal advice from their own attorney. Surely, if claimants had been made aware that they were dealing with the Dow Corning Legal Department (as opposed to a customer service representative), they would have been much more inclined to have sought legal counsel.

9. Claimants Are First Alerted That Dow Corning Asserts That The "Receipt and Release" is a Complete Bar To Their Future Settlement When the SF-DCT Does a Mass Mailing in 2004 and 2005

In late 2004 and April 2005, the Settlement Facility mailed claimants a letter informing them that Dow Corning had provided a copy of a signed release which Dow Corning asserted was a complete release of all claims. Almost immediately, the CAC was inundated with calls and correspondence from claimants who were shocked and outraged that Dow Corning was taking the position that the release was a complete release of all claims. They universally stated that Dow Corning had misled them into believing that the release was only for "the costs of the corrective surgery ...," and that they believed that they had preserved their right to collect damages for rupture, disease, and other injuries. The women that the CAC has spoken with reported that they did not have any discussions with Dow Corning regarding compensation for any injuries, and indeed, none of the claimants had asked Dow Corning for compensation other

than financial assistance with their implant removal. Each believed that they had preserved their right to compensation for other injuries, as evidenced by their pursuit of their claim for the past decade in both the MDL-926 global settlement and in the Dow Corning bankruptcy proceedings.

Mrs. Goldrich also states in her affidavit that she feels she was misled by Dow Corning's Removal Assistance Program, and that she feels that Dow Corning "duped her" to promote a program that she and other women only now understand was a litigation claims program as part of the defense strategy of the Dow Corning Legal Department. *See* Exhibit 7 at ¶¶ 11-12. She states:

> 11. I have read the internal Dow Corning documents referenced in the motion filed by the Claimants' Advisory Committee. I feel I was duped, deliberately misled and lied to by Keith McKennon and Dow Corning. While they were publicly saying one thing to me that they could not afford to pay more than $1,200 and that they wouldn't require a release, it is now apparent to me that they were privately plotting an entirely different program that did pay more money and did require a release.
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> 12. I am shocked an appalled to learn that I was deceived in this manner by Dow Corning. They caused me to unknowingly encourage women to call Dow Corning's "800" number when they knew (but didn't tell me or anyone else) that those calls were sent to paralegals working in defense of Dow Corning's litigation. I would never have agreed to support the Removal Assistance Program or given out the "800" number if I had known that this was all a part of Dow Corning's defense strategy and that defendants would have a 'pipeline' into claims.

Id.

10. <u>The Circumstances Attending The Six Claimants' Execution Of Their Releases</u>

Attached to this motion are six signed statements that are representative of the many unrepresented claimants whose rights are affected by this issue. The statements outline the circumstances surrounding the execution of their release and each claimant's understanding of the scope of the release. Common facts have emerged:

1) All six claimants were unrepresented at the time they signed the "Receipt and Release. *See* Statement of [redacted] at ¶ 16, attached as Exhibit 2A; Statement of [redacted] at ¶ 7, attached as Exhibit 2B; Statement of [redacted] at ¶ 7, attached as Exhibit 2C; Statement of [redacted] at ¶ 8, attached as Exhibit 2D; Statement of [redacted] at ¶ 13, attached as Exhibit 2E; and Statement of [redacted] at ¶ 9, attached as Exhibit 2F.

2) Some were financially desperate and could not afford the surgery. *See* Statement of [redacted] at ¶ 7, attached as Exhibit 2A; Statement of [redacted] at ¶ 4, attached as Exhibit 2B; and Statement of [redacted] at ¶ 7, attached as Exhibit 2E.

3) Claimants were told by their plastic surgeon that surgery was medically necessary because the implant had either failed or the claimant was experiencing severe pain. *See* Statement of [redacted] at ¶ 3, attached as Exhibit 2A; Statement of [redacted] at ¶ 2, attached as Exhibit 2B; Statement of [redacted] at ¶ 2, attached as Exhibit 2D; Statement of [redacted] at ¶ 2, attached as Exhibit 2E; and Statement of [redacted] at ¶ 2, attached as Exhibit 2F.

4) All six claimants state that they believed the release was only for "the costs of the corrective surgery" and never understood or considered that they were releasing any other claim. In fact, they stated that they would not have released their claims for other injuries when there was no compensation offered, discussed or paid for other injuries. *See* Statement of [redacted] at [redacted] at ¶¶ 13 and 15, attached as Exhibit 2A; Statement of [redacted] at ¶ 9, attached as Exhibit 2B; Statement of [redacted] at ¶¶ 8 and 9, attached as Exhibit 2C; Statement of [redacted] at ¶ 5, attached as Exhibit 2D; Statement of [redacted] at ¶ 10, attached as Exhibit 2E; and Statement of [redacted] at ¶¶ 6 and 8 , attached as Exhibit 2F.

5) All six claimants continued to pursue their claim for other damages against Dow Corning in the global settlement and/or bankruptcy proceedings. *See* Statement of [redacted] at [redacted] at ¶ 17, attached as Exhibit 2A; Statement of [redacted] at ¶ 10, attached as Exhibit 2B; Statement of [redacted] at ¶ 9, attached as Exhibit 2C; Statement of [redacted] at ¶ 9, attached as Exhibit 2D; Statement of [redacted] at ¶ 14, attached as Exhibit 2E; and Statement of [redacted] at ¶ 10 , attached as Exhibit 2F.

6) Claimants did not receive money for themselves. The money was paid to the plastic surgeon for the surgery with the exception of $163 that was paid to reimburse claimant [redacted] for medication prescribed to address a minor complication from the implant removal surgery. *See* Statement of [redacted] at [redacted] at ¶ 14, attached as Exhibit 2A; Statement of [redacted] at ¶ 8, attached as Exhibit 2B; Statement of [redacted] at ¶ 7, attached as Exhibit 2D; Statement of [redacted] at ¶ 11, attached as Exhibit 2E; and Statement of [redacted] at ¶ 4 , attached as Exhibit 2F.

7) Claimants [redacted] and [redacted] all relied on claims by Dow Corning that the Removal Assistance Program did not require a release of all claims. *See* Statement of [redacted] at [redacted] at ¶ 4, attached as Exhibit 2A; Statement of [redacted] at ¶¶ 4 and 9, attached as Exhibit 2b; Statement of [redacted] at ¶ 4, attached as Exhibit 2C.

8) Claimants [redacted] and [redacted] did not have any direct contact with Dow Corning, but their explanting surgeons did. Each was told by the doctor or nurse that the release was only for the costs of the surgery and was not a release of all rights. *See* Statement of [redacted] at ¶ 4, attached as Exhibit 2D; Statement of [redacted] at ¶¶ 8 and 9, attached as Exhibit 2E; and Statement of [redacted] at ¶¶ 5 and 6 , attached as Exhibit 2F.

The circumstances in which these releases were obtained was thus inherently misleading, unfair, and unconscionable.

ARGUMENT

I. The Court Should Find That All "Receipt and Releases" Should Be Voided As Unconscionable And Based On Dow Corning's Deceptive Actions

The CAC adopts and incorporates by reference Plaintiffs' Liaison Counsel's Response To DCC Litigation Facility, Inc.'s Motion For Summary Judgment Of Previously Settled Claims ("Plaintiffs' Liaison Counsel's Response) and all of the legal arguments articulated therein, attached hereto as Exhibit 24.

The facts outlined above establish that most of the "releases" obtained by Dow Corning from unrepresented claimants in the years leading up to its bankruptcy would likely be found to be unenforceable under a number of related doctrines. In determining the meaning and enforceability of a release, courts review not just the language of the release itself but also "all surrounding facts and circumstances under which the parties acted." *See Adams v. Phillip Morris, Inc.*, 67 F.3d 580, 585 (6th Cir. 1996). A release must be "fairly and knowingly made" and may not be enforced in "situations where because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it is deemed inequitable to allow the release to serve as a bar to the claim of the injured party." *Mangini v. McClurg*, 301 N.Y.S.2d 508, 517, 249 N.E.2d 386, 392 (1969).

The courts will look to subsequently discovered facts to determine whether the doctrines of unconscionability or mistake require a release to be held unenforceable. The modern trend is to set aside releases of personal injury claims in situations where the facts, when finally known, present an unconscionable result because of the equitable principle of doing justice in the circumstances of each case. *Newborn v. Hood*, 86 Ill. App. 3d 784, 786, 401 N.E.2d 474, 476

(Ill. App. Ct. 1980) (citation omitted). *See generally* Restatement (2d) Contracts, Section 208 (governing unconscionability of contracts).

Broadly speaking, courts consider both "procedural" and "substantive" issues in considering the potential unconscionability of enforcing a contract. *See Wade v. Austin*, 524 S.W.2d 79, 85 (Tex. Ct. of Civil Appeals) (1975) (finding of unconscionability generally based on "procedural abuse" concerning circumstances of contract formation and "substantive abuse" concerning substance of contract terms).

In considering the procedural aspects of unconscionability, courts focus on such factors as the relative intelligence, resources, and bargaining powers of the parties, and whether the release was granted in circumstances involving pressure, duress, confusion, or other unfairness. *See, e.g., Entergy Mississippi v. Burdette Ginco*, 726 So. 2d 1202, 1207 (Miss. 1998) (unconscionability shown by disparity in sophistication of parties, lack of opportunity to study contract, and great imbalance in parties' relative bargaining power); *Bloss v. Va'ad Harabonim of Riverdale*, 203 A.D.2d 36, 40, 610 N.Y.S.2d 197, 199 (1st Dept. 1994) ("[It is] inequitable to allow a release to bar a claim where . . . it is alleged that the releasor had little time for investigation or deliberation and that it was the result of overreaching or unfair circumstances."); *Kelly v. Widner*, 236 Mont. 523, 528, 771 P.2d 145 (1989) (plaintiff's "dire financial situation, her lack of education and lack of legal advice, and her isolated living arrangements created a vulnerability susceptible to exploitation" supporting argument of unconscionability); *Witt v. Watkins*, 579 P.2d 1065, 1070 (Alask. 1978) (relevant factors in determining whether to set aside release include "the manner in which the release was obtained including whether it was hastily secured at the instigation of the releasee; whether the releasor was at a disadvantage because of

the nature of his injuries; whether the releasor was represented by counsel . . . [and] the relative bargaining positions of the parties").

Substantive unconscionability is established, in many cases, by a showing that the consideration received for the release was — or later proved to be — grossly inadequate in view of the severity of the plaintiff's injuries. *See, e.g., Maglin v. Tschannerl*, 800 A.2d 486, 488, 174 Vt. 39, 42 (2002) ("The greater the disparity in the actual damages that manifested themselves after the signing of a release, and the amount paid in the early settlement, the more likely it is the court will find some manner of voiding the release."); *Kelly*, 771 P.2d at 146, 236 Mont. at 529 ("large disparity between settlement amount and the actual monetary loss which the injured party eventually incurred" relevant to "issue of whether the settlement amount indicates an unconscionable bargain"); *Newborn*, 408 N.E.2d at 476, 86 Il. App. 3d at 787 (unconscionability established where plaintiff received $1,200 for settling case and, as a result of subsequent heart attack, incurred medical bills over $8,200); *Wit*, 579 P.2d at 1070 ("amount to be paid" relevant to unconscionability).

II. Claimants Were Defrauded, Misled and the Victim of a Unilateral Mistake Caused By Dow Corning's Deceptive Actions

Closely related to the unconscionability doctrine, a release will not be enforced against a party who was defrauded, misled, or the victim of a unilateral mistake as to which the released party bears some culpability. *See, e.g., Ott v. Midland-Ross Corp.*, 600 F.2d 24, 32 (6th Cir. 1979) ("The law generally recognizes that misrepresentation in the procurement of a contract renders the agreement avoidable by one induced thereby, irrespective of the culpability of the person making the representation."); *Kraft Foods, Inc. v. All These Brand Names, Inc.*, 213 F. Supp. 2d 326, 330 (S.D.N.Y. 2002) (under New York law, contract rescinded for unilateral

mistake where party enters into contract under mistake of material fact where other party knew or should have know such mistake was being made, even absent fraud).

Moreover, where parties enter into a settlement based on a mutual mistake as to the ultimate gravity of the plaintiff's injury — which proves either to be grossly more serious or of a different kind than originally understood — a release given for minimal consideration may be set aside on that ground as well. *Web v. Dickerson*, No. Civ.A 01C-02-269JRJ, 2002 WL 388121, at *3-4 (Del. Supr. 2002) (release will not operate as bar if parties under mutual mistake as to existence or extent of plaintiff's injuries and parties would have agreed to higher settlement if ultimate nature of injuries had been known); *see, e.g., Newborn*, 408 N.E.2d at 475-76, 87 Ill. App. 3d at 786 (release may be set aside based on "mutual mistake of fact . . . as to the nature and extent of the injuries incurred by the plaintiff," where enforcing release would be unconscionable).

As demonstrated above, the facts here establish many of the factors traditionally calling release provisions under suspicion as unconscionable and unenforceable:

▶ Implanted women were solicited to contact Dow Corning about a no-release financial assistance program to have failed implants removed, a situation that Dow Corning acknowledges is a medical necessity. It is not elective surgery.

▶ The announcement of the no-release program was accompanied by the announcement that Dow Corning was creating a $10 million fund for breast implant research.

▶ In response to the publicity about a no-release program, claimants inevitably and predictably called and asked questions about payment for the full costs of the surgery. At that time, RAP representatives – who were really temporary hires who deliberately were not trained

or informed about the removal and claims programs -- were trained to transfer the calls to highly educated, experienced Dow Corning paralegals.

▶ These paralegals were integral to Dow Corning's defense of breast implant litigation. Their job title, nature of their work and the fact that they were part of the Dow Corning Legal Department was obfuscated by Dow Corning's deliberate name change in 1992 from paralegal to "Customer Relations Specialists." They were trained and encouraged to think creatively to guide unsuspecting, frightened and desperate women to a release program that was never fully explained or described to them.

▶ The only conversations and/or correspondence claimants had with the "Customer Relations Specialists" were to ensure that the explanting doctor's fees would be paid in full for a medically necessary surgery that the caller could not otherwise afford.

▶ Callers were unrepresented by counsel and were not advised that they could or should seek legal counsel, including court-appointed class counsel, to assist them and answer questions. Nor was it disclosed to them that the "Customer Relations Specialists" were supervised by and reported to attorneys within Dow Corning.

▶ Plastic surgeons were induced to obtain a release for the benefit of Dow Corning to ensure that all of their fees would be paid instead of the meager $1,200 Dow Corning offered if the doctor did not obtain a release. In addition, Dow Corning used the doctor as its agent in delivering information, documents and in obtaining signed Medical Authorization and releases.

▶ Last, the document the claimant was asked to sign, and the circumstances that led to the execution of the document, were designed to and did mislead claimants to believe that the "release" was only "for the costs of the corrective surgery." References to legal terms were removed, standard legal language and format such as requiring the documents to be notarized

were deleted, and all references to the fact that claimants were dealing with trained, experienced paralegals in Dow Corning's Legal Department were omitted. At no time did the claimants understand that Dow Corning was asking for a full release of all liability for claims other than the costs of the corrective surgery, and, in fact, they received no payment themselves since the "Receipt and Release" document covered only the explanting surgeon's costs.

▶ Crucially, the key language in the "Receipt and Release" document was profoundly misleading. Although the release form recited that it pertained to "all claims" against Dow Corning and its related parties, the release further recited that it was given "in settlement of a dispute as to the circumstances and cause of the corrective surgery on [specific date]." This language is at best confusing and at worst actively misleading and, as a matter of fact, misled women into believing they were releasing *only* claims arising from the performance of the surgery itself. Equally important, the standard form of release was expressly limited to claims "now known by me," which by definition should not act to bar women from collecting settlements based on disease symptoms that manifested themselves only after explantation.

Dow Corning's obtaining of releases from unrepresented women reflects grossly disproportionate bargaining power, knowledge, and resources — suggesting that any releases obtained must be carefully scrutinized for unfairness or overreaching. This is all the more true here because of the highly charged atmosphere of fear and near-panic that prevailed after reports of serious health problems associated with breast implants surfaced in 1992, as a result of which many women were desperate to obtain explantation and thus extremely vulnerable to being confused or misled.

Moreover, most women subject to these releases received absolutely no cash from Dow Corning because funds were paid directly to the doctor to perform the surgery. The small or

non-existent consideration received goes both to the fundamental fairness of enforcing these releases and to the Court's consideration of what claimants' reasonably understood they were releasing in return for such paltry consideration.

Based on the totality of the circumstances and all of these factors, the only fair result here is to impose the same remedy employed by Judge Pointer in the MDL and as set forth in the Settlement Facility and Fund Distribution Agreement — to provide that women in the relevant categories be permitted to participate in the SF-DCT, with the amounts received in exchange for their "releases" operating as an offset from their Explant Payment rather than a bar. It is clear that in the overwhelming majority of cases this will be the only fair result, and that adopting this remedy globally will spare the SF-DCT and the Court from the severe burden of conducting a case by case adjudication. Indeed, this is what the Plan provides at Section 7.02(c). All women who signed the confusing "Receipt and Release" form, which was both limited to "known" injuries and expressly suggested that the release was tied to the circumstances of the *surgery* — should be permitted to participate in the settlement. Similarly, any claimant who received no direct payment from Dow Corning cannot, in good conscience, be barred from participating in the settlement. This category of claimants must be permitted to participate in the SF-DCT.

Finally, in the alternate, every claimant must at minimum be given the opportunity to come forward and demonstrate that she was, in fact, confused or misled by the nature of the release document itself and that enforcing the release, based on the overall facts of duress and mistake, would be unconscionable in her individual case. The CAC believes that this can best be achieved, if the Court is not prepared to order a blanket remedy, by permitting claimants to submit an affidavit describing the circumstances in which they provided their release.

WHEREFORE, the CAC respectfully requests that the Court enter an Order declaring that the "Release and Receipt" document solicited by the Dow Corning Legal Department from unrepresented claimants from 1992 – 1995 as part of the Removal Assistance Program (or represented as part of such program) is not a general release and does not bar claimants from participating in the Settlement Option.

Respectfully submitted,

ON BEHALF OF THE CLAIMANTS' ADVISORY COMMITTEE

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