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	)	
	)	
	)	

MDL 926 SETTLEMENT FUND MOTION FOR RESOLUTION OF LIEN CLAIMS AGAINST SETTLEMENT FACILITY - DOW CORNING TRUST PAYMENTS TO CLAIMANTS

COMES NOW, the MDL 926 Settlement Fund ("MDL 926"), by and through its Escrow Agent, Edgar C. Gentle, III, and states as follows:

1. At the invitation of Settlement Facility - Dow Corning Trust ("SF-DCT"), MDL 926 provided SF-DCT with written notice of 193 lien claims (the "MDL 926 Liens") against funds due claimants ("Lien Claimants") from SF-DCT, pursuant to the provisions of this Court's Amended Stipulation and Order Establishing Procedures for the Review of Asserted Liens Against Settlement Implant Claimants approved June 30, 2005 ("Stipulation and Order"). Subsequently, SF-DCT invited MDL 926 in writing to file a Proof of Lien for 69 of the MDL 926 Liens, and MDL 926 timely submitted them.

2. The MDL 926 Liens for which MDL 926 has timely filed a Proof of Lien at the

written request of SF-DCT are itemized in proprietary **Exhibit A**[1], providing the Lien Claimant's SID Number, the date SF-DCT invited MDL 926 in writing to file the MDL 926 Proof of Lien Form, the date the MDL 926 Proof of Lien was filed by MDL 926 with SF-DCT, and the known status of each MDL 926 Lien Claim.[2]

Of these 69 MDL 926 Lien Claims, 5 have been paid by SF-DCT to MDL 926, 4 were withdrawn by MDL 926, 1 is a duplicate, and one was added this week, leaving 60.[3] Of the 60, SF-DCT claims that 17 are not ripe or are on "fraud hold", leaving 43 MDL 926 Lien Claims which SF-DCT has related are ripe for decision by this Court, and for which SF-DCT has agreed we are to serve the Lien Claimants with this Motion, supporting Brief and this Court's June 18, 2007 Order establishing this proceeding. These are identified in **Exhibit A**.

3. Beginning in 2006, the SF-DCT has failed to pay the MDL 926 Liens, including those liens which the Lien Claimant or the Lien Claimant's counsel has given notice of consent to MDL 926 and one MDL 926 Lien which SF-DCT agreed on December 6, 2005, to honor, in violation of Lien Procedure 4.02(b). Further, the SF-DCT has failed to provide MDL 926 with any claimant objection or other response to said liens as required by Section 4.02(d) of the Lien Procedures approved by the Stipulation and Order.

This has disadvantaged MDL 926 in attempting to prepare this Motion and supporting Brief, so as to be as granular as possible and to provide specific support for each MDL 926 Lien. As the Court will recall, on our recent May 17, 2007 conference call, at the request of Ralph

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[1]To protect claimant confidentiality, Exhibit A is being provided in camera only to the Court, the two Claims Administrators and the Claimants' Advisory Committee.

[2] As indicated below, only SF-DCT knows the status of many of these Lien Claims, because we have not received the claimant's response from SF-DCT as required by Section 4.02 of the Procedural Rules under the Stipulation and Order.

[3] Merely for the purpose of reconciling the number of lien claims at issue between the two offices, it must be noted that SF-DCT submitted an additional Notice and Proof of Lien to MDL 926 of June 25, 2007, for a current net of 60 Lien Claims.

Knowles, MDL 926 agreed to provide as much detail as possible for each MDL 926 Lien in this submission. We therefore requested in the June 4, 2007 letter in **Exhibit B** to the Honorable David Austern that SF-DCT provide the Lien Claimant responses as required by Section 4.02(d) of the Lien Procedures approved by the Stipulation and Order. On June 19, 2007, upon the advice of the Claimants' Advisory Committee, SF-DCT declined to provide these documents, with the Claimants' Advisory Committee claiming that this is a preliminary proceeding on the validity of the MDL 926 Liens, and that the requested documents are not relevant. We are unaware of any other Lienholder being so treated by SF-DCT, in contravention of its own rules.

This unfortunate development renders our compliance with Mr. Knowles' granular presentation request impossible, and it prevents us from fully and fairly describing the equitable basis for the MDL 926 Liens, most of which is factually specific to each Lien Claimant. We therefore reserve the right to supplement and amend this Motion and Supporting Brief when we obtain the requested documentation, to which we have an undisputed right under the Lien Procedures.

4. As indicated above, MDL 926 has identified 60 unresolved Lien Claims for which it timely filed Proof of Liens after SF-DCT sent a Notice and Proof of Lien form to MDL 926 for each of these claimants, inviting us to do so.

Upon information and belief, SF-DCT is ready to pay these Lien Claimants ("60 Current Liens") and is awaiting only the resolution of the lien issues, subject to ripeness and "fraud" issues for 17 of them. At the instruction of SF-DCT, we are serving the net resulting 43 ripe "Current Lien" Claimants, identified in proprietary **Exhibit A**, with this Motion and supporting Brief and this Court's June 19, 2007 Order establishing this proceeding, and the Claimants' Advisory Committee's letter of explanation in **Exhibit C**. As indicated above, MDL 926 has also given notice to SF-DCTof a Lien Claim for 105 additional claimants, but SF-DCT has not

provided MDL 926 with a Notice and Proof of Lien Form. To date, MDL 926 does not know the status of these. Thus, MDL 926 has not filed a Notice and Proof of Lien Form for these claims yet, pending receipt of the forms from SF-DCT. MDL 926 has no information on the current status of these claimants' claims with the SF-DCT (the "Additional Current Liens"). MDL 926 believes that it will be necessary to file additional lien claims with SF-DCT in the future as additional MDL 926 claimants perfect their filings with SF-DCT before the expiration of MDL 926 in 2010 (the "Future Liens").

5. The Brief submitted herewith outlines the factual and legal basis for finding all 60 Current Liens to be valid.

WHEREFORE, MDL 926 respectfully moves that this Honorable Court take the following action with respect to the MDL 926 Liens:

(a) Order SF-DCT's production of the required Lien Claimants' response documentation to MDL 926 in accordance with Section 4.02(d) of the Lien Procedures approved by the Stipulation and Order, and afford MDL 926 a reasonable time thereafter to amend and supplement this Motion and supporting Brief based on this additional documentation;

(b) Order SF-DCT to honor the Lien Claims consented to by the Lien Claimants under Lien Procedure 4.02(b);

(c) Recognize the validity of the MDL 926 Liens against payments by SF-DCT to Lien Claimants;

(d) Establish procedures for payment of the 60 Current Liens to MDL 926 not consented to by the Claimants;

(e) Enforce the provisions of Section 4 of the Lien Procedures under the Stipulation and Order with respect to the issuance of Notices and Proof of Lien forms and notification of Lien Claimant objections by SF-DCT for the Additional Current Liens and Future Liens; and

(f) Designate the procedures established for processing the 60 Current Liens as precedent for the processing of the Additional Current Liens and any Future Liens.

Respectfully submitted this the 29th day of June, 2007.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	)	**Case No. 00-CV-00005-DT**
	)	**(Settlement Facility Matters)**
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DOW CORNING CORPORATION	)	**Hon. Denise Page Hood**
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Reorganized Debtor	)	
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MDL 926 SETTLEMENT FUND MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR RESOLUTION OF LIEN CLAIMS AGAINST SETTLEMENT FACILITY - DOW CORNING TRUST PAYMENTS TO CLAIMANTS

COMES NOW, the MDL 926 Settlement Fund ("MDL 926"), by and through its Escrow Agent, Edgar C. Gentle, III, and, in support of its Motion for Resolution of Lien Claims Against Settlement Facility - Dow Corning Trust, states as follows:

This case involves 60 Current Liens filed by MDL 926 at the written invitation of SF-DCT for claimants who have already been paid in full. Of these, 43 have been noticed, as ripe, at the request of SF-DCT. See, list in Exhibit A to the Motion. This Court is asked to decide if the claimants are to receive a windfall payment by SF-DCT, resulting in their being paid 150% of what they are due, or if the resulting 50% unjust enrichment amount that was overpaid by MDL 926 should be refunded by SF-DCT to MDL 926.

I.
FACTS

In 1994, the Federal District Court for the Northern District of Alabama certified *Lindsey v. Dow Corning, et al.* as a class action and approved a $4.2 billion settlement for women who received silicone gel breast implants prior to June 1, 1993 (the "Global Settlement"). Dow Corning Corporation ("Dow") was one of the Settling Defendants (as that term was defined in the Global Settlement). The Settling Defendants initially deposited $78,750,000 for payment of

claims to the settlement class and for overhead and administrative costs for the MDL 926 Claims Office. Dow's portion of the initial deposit was $42,500,000.

To participate in the settlement, eligible members of the settlement class (sometimes hereinafter referred to as "settlement class members" or as "claimants") were required to file a Registration Form[1] to preserve their rights to benefits under the Global Settlement or could choose to opt-out of the Global Settlement and pursue their individual rights in Court. The Global Settlement provided that if a sufficient number of the settlement class members opted out, so that a Settling Defendant deemed its potential liability outside the Global Settlement to be excessive, the Settling Defendant could withdraw from the Global Settlement. See Revised Breast Implant Litigation Settlement Notice attached to Order No. 22, *Lindsey v. Dow Corning Corp.*, CV-94-P-11558-S, entered September 19, 1994.

In 1995, Dow filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court for the Eastern District of Michigan, and the benefits available to settlement class members under the Global Settlement were revised. See the Bristol, Baxter, 3M, McGhan & Union Carbide Revised Settlement Program (the "Revised Settlement Program" or "RSP") attached to Order No. 27, *Lindsey v. Dow Corning Corp.*, CV-94-P-11558-S, entered December 22, 1995. Although Dow was no longer a Settling Defendant in the RSP, Dow's initial payment of $42,500,000 remained in the RSP for a time (the "Dow MDL 926 Payment"). Notice of the revised benefit provisions ("RSP Notice") was sent to settlement class members, including notification that members with both RSP manufacturer implants and Dow implants would have their benefits reduced by 50% in the RSP. Attached hereto as **Exhibit A** and incorporated herein by reference is a copy of Sections D.2 and F.1. of the RSP Notice. Claimants with Dow implants were notified of their right to file creditor claims in Dow's bankruptcy proceedings if they had Dow implants. See Order No. 27.

Each claimant in the RSP was required to file a Proof of Manufacturer form ("POM"), identifying the manufacturer and/or implant brand of each of their implants, and provide hospital records identifying the implant brand/manufacturer or certified copies of medical records

[1]The only information required on the Registration Form in the Global Settlement with respect to implant identification was the date and location (state/country) of implantation of the claimant's first set of breast implants and "if known" the manufacturer or model or name of the implants. Since all claimants were to be treated the same, regardless of the manufacturer of the implant, little emphasis was given to pinpointing implant manufacturers.

containing the implant label. If the claimant was unable to identify the manufacturer of her implants, she was required to submit a statement of the efforts she made to locate such records and why she was unsuccessful. The POM contained the following statement immediately above the signature line for the claimant:

> I declare under penalty of perjury that the above information (and any information contained on supplemental pages) is - to the best of my knowledge, information, and belief - true, accurate and complete.

See RSP Notice. Attached hereto as **Exhibit B**, and incorporated herein by reference, is a copy of the RSP POM form.

Dow's Amended Joint Plan of Reorganization, dated February 4, 1999, was approved and the Settlement Facility and Fund Distribution Agreement between Dow and the Claimants' Advisory Committee pursuant to the Amended Joint Plan of Reorganization became effective on June 1, 2004 (the "Dow Settlement Plan"). When the Dow Settlement Plan was negotiated, discussions were undertaken with MDL 926 regarding sharing office space, personnel, and overhead, as well as financial responsibilities and resources. Initially, the Settlement Facility - Dow Corning Trust ("SF-DCT") and MDL 926 shared a common Claims Office, with the first SF-DCT Claims Administrator, The Honorable Katie Kennedy, sharing a common office with The Honorable Ann Tyrell Cochran, the then MDL 926 Claims Administrator. SF-DCT employees were on the MDL 926 payroll, and SF-DCT's share of Claims Office overhead was paid by MDL 926 from the Dow MDL 926 payment. SF-DCT eventually maintained office space and personnel separate from the MDL 926 Claims Office. However, the Dow Settlement Plan provided that SF-DCT would use the same procedures for processing claims and quality control as those used by MDL 926, and SF-DCT Claims Administrator was authorized to cooperate with the MDL 926 Claims Office "in an effort to maintain consistent interpretations as appropriate." See, Section 4.03(a) of the Dow Settlement Plan. The Dow Settlement Plan further stated

> ...it is intended that the Claims Administrator [for SF-DCT] will generally apply and maintain any procedures established by the MDL 926 Claims Administrator to detect fraudulent claims.

See, also, Section 5.04(a) of the Dow Settlement Plan. The Dow Settlement Plan also adopted guidelines and protocols used by the MDL 926 Claims Office for processing claims. See, Section 7.01(a) of the Dow Settlement Plan. Attached hereto as **Exhibit C** and incorporated herein by reference are copies of Sections 4.03(a), 5.04(a) and 7.01(a) of the Dow Settlement Plan.

The benefit portion of the Dow Settlement Plan essentially mirrored that of the RSP, except in two minor respects; the disease benefit is the same in both Plans. See, Order 27 and the Dow Settlement Plan.

Thus, SF-DCT was expressly modeled to follow the claimant payment protocols of MDL 926, and the two facilities have tried to cooperate in the claimant payment process accordingly.

MDL 926 began making payments on claims in 1996. Claims identifying only Baxter, Bristol and/or 3M implants ("RSP implants") on the POM were paid in full. Payment of claims identifying RSP implants and Dow implants on the POM were reduced by fifty percent (50%) under the RSP. In processing claims identifying RSP implants and "unknown" manufacturers' implants, the MDL 926 Claims Office did not reduce the RSP benefits paid on the mere possibility that the unknown implants might be Dow implants, but paid those claims in full to provide those claimants with the maximum benefit possible. Many RSP claimants received their payments before there was a Dow Settlement Plan in place, with the amount that Dow may pay implant claimants being unresolved. Nearly 90,000 claimants have been paid benefits by MDL 926. See Affidavit of Jean M. Eliason, Claims Administrator for the MDL 926 Claims Office, attached hereto as **Exhibit D** and incorporated herein by reference.

When SF-DCT began receiving and processing claims, claimant information was shared by SF-DCT and the MDL 926 Claims Office via computer software and other means. SF-DCT also accessed the actual claimant files maintained by the MDL 926 Claims Office. A computer comparison of MDL 926 claimants and SF-DCT claimants revealed a match for certain claimants, indicating that those claimants filed both a RSP claim with the MDL 926 Claims Office and a subsequent claim with SF-DCT. MDL 926, with the agreement of the Honorable Wendy Trachte- Huber, SF-DCT's then Claims Administrator, filed liens against SF-DCT payments to claimants who had been paid by MDL 926 without the 50% reduction for Dow

implants, in order to avoid double dipping. See, Affidavit in Exhibit D. It was also acknowledged by the two Administrators that the reverse situation could occur in the future, with SF-DCT having fully paid a claimant first and entering a lien on RSP benefits.

II.

DOW'S LIEN PROCEDURES

By Order entered June 30, 2005, this Honorable Court established review procedures for liens asserted against funds due Dow Settlement Plan claimants in **Exhibit E** ("Lien Procedures").

> Section 4.01(a) of the Lien Procedures requires:
> a. Upon receipt of an Alleged Lienholder [persons or entities who assert the right to receive all or a portion of the payment(s) to Claimants from SF-DCT] claim, SF-DCT shall send a Notice – via Certified, first-class mail – and Proof of Lien form (Exhibit 1 to these Procedures) to the Alleged Lienholder. SF-DCT shall send the Notice and Proof of Lien to the Alleged Lienholders who are identified in the data provided to SF-DCT by the CAF [Dow Corning Claims Administration Facility]. The Alleged Lienholder must return the completed Proof of Lien form and support documentation to SF-DCT within 30 days from the date of the Notice from SF-DCT.

Under this section, SF-DCT must send a Notice and Proof of Lien form to MDL 926 upon receipt of a lien assertion. MDL 926 is required to complete and return the Proof of Lien form to SF-DCT, along with supporting documentation within 30 days from the date of the Notice. To the extent that MDL 926 has received a Notice and Proof of Lien form from SF-DCT upon MDL 926's asserted liens, MDL 926 has completed and timely returned such Proof of Lien. This procedure has been repeated for 64 of the 193 liens asserted by MDL 926.

Once the Proof of Lien form has been completed and returned to SF-DCT, Section 4.02 of the Lien Procedures requires:

> a. Upon receipt of the Proof of Lien form and supporting documentation, if any, SF-DCT shall provide a copy to the Claimant, or to the Claimant's attorney of record if the Claimant is represented, along with a copy of these Procedures and a notice of Objection or Resolution of Lien form (Exhibit 2 to these Procedures). If the Clamant wishes to contest the asserted lien, (s)he must do so by returning a completed Notice of

Objection form to SF-DCT no later than 45 days from the date of the letter.

b. If the Claimant fails to file the Notice of Objection or Resolution of Lien form, as specified at Section 4.02(a) above, then SF-DCT shall be authorized to honor the asserted lien (but is not required to do so if the lien is otherwise deficient or invalid) and pay the Claimant minus the Alleged Lienholder's lien amount.

c. If the Claimant submits the Notice of Objection or Resolution of Lien form and informs SF-DCT that she consents to the lien and lien amount or has resolved the lien, SF-DCT is authorized to withhold the agreed amount from the Claimant's payment.

d. If the Claimant submits an objection on the Notice of Objection or Resolution of Lien form, SF-DCT shall provide a copy of the form to the Alleged Lienholder. In addition, SF-DCT shall forward the Proof of Lien and Notice of Objection or Resolution of Lien forms along with supporting documentation to the Lien Judge for resolution, as specified at Section 6 below.

Under these provisions, SF-DCT is required to provide a copy of the filed Proof of Lien form and any supporting documentation to the claimant or the claimant's attorney along with a Notice of Objection or Resolution of Lien form. If the claimant does not object to the alleged lien, SF-DCT may honor the lien unless it is deficient or invalid. If the claimant objects to the alleged lien, SF-DCT is **required** to provide a copy of the Notice of Objection to the alleged lienholder. If the claimant affirmatively consents to the alleged lien, SF-DCT may honor the lien.[2]

[2]Please note that, unlike the procedure upon a claimant objection in Section 4.02(b), the modifier "(but is not required to do so if the lien is otherwise deficient or invalid)" is not included in Section 4.02(c) when a claimant consents to a lien.

To date, MDL 926 has filed 193 liens with SF-DCT. The current status of those liens, to the extent known by MDL 926, as follows:

Total MDL 926 Liens	193
(**Liens paid MDL 926 by SF-DCT**)	(**5**)
(Liens withdrawn by MDL 926)	(23)
(Lien being investigated for fraud)	(1)
(Liens for which SF-DCT has not provided a Notice and Proof of Lien form)	(104)
Total Current Liens	60

See, in camera, spreadsheet of the 60 Current Liens attached hereto as **Exhibit F** and incorporated herein by reference. This spreadsheet is being provided to the Court, the SF-DCT Claims Administrator, and the Claimants' Advisory Committee, in camera, in order to protect claimant confidentiality. Although the only claimant identifying information in Exhibit F is the name and SID number, the spreadsheet describes certain records contained in each claimant file, which may be deemed confidential.

Service copies of this Brief not provided to the Court or the Claimants' Advisory Committee (i) do not contain Exhibit F for non-claimants; and (ii) only contain the portion of Exhibit F applicable to the specific claimant for each claimant.

During the period from September to December, 2005, SF-DCT paid 5 liens which had been filed by MDL 926. Since that time, SF-DCT has paid no other MDL 926 liens, even where the Lien Claimants have given their consent to the liens and/or have not, to MDL 926's knowledge, filed timely objections to said liens and the lien is unresolved. This violates Section 4.02(c).

As indicated in Exhibit F, the 60 liens listed as "Current Liens" are liens for which SF-DCT has submitted a Notice and Proof of Lien form to the MDL 926 Claims Office and MDL 926 has filed completed the Proof of Lien forms ("60 Current Liens") with one exception. SF-DCT informed the MDL 926 Claims Office this week of an additional claimant on which a Proof

of Lien form should be filed and MDL 926 is in the process of preparing the Proof of Lien form for filing with SF-DCT.

All 60 Current Lien Claims are double dippers: They have been paid in full by the MDL 926 RSP, without the 50% reduction required when the claimant is known to have Dow implants. Each is now trying to be paid by SF-DCT and, if they qualify for an SF-DCT payment, they have been overpaid by the MDL 926 RSP by 50%. Thus, a refund is due to MDL 926, under unjust enrichment principles, to prevent double dipping. The equitable grounds for this refund, to prevent gross injustice, are itemized below. The 60 Current Liens fall into 3 distinct categories:

(1) 20 represent claimants who listed only RSP manufacturers on their POM and the medical records currently in the claimant files show no evidence of Dow implants, but who have now also filed claims with SF-DCT;

(2) 10 represent claimants whose POM or the medical records currently in their files evidence a Dow implant; 5 of these 10 do not identify a Dow implant on their POM, there are merely medical records in the file indicating a Dow implant (which medical records, in some cases, were received after payment had been made by MDL 926 to the claimant); in all of these cases, the claimants have now filed claims with SF-DCT; and

(3) 30 represent claimants who indicated on their POM that the manufacturer of one or more of their implants was unknown; no evidence was ever presented to the MDL 926 Claims Office identifying any of these unknown implants as Dow, but these claimants have also filed claims with SF-DCT indicating that these previously unidentified products are Dow implants.

The MDL 926 Claims Office has received claimant filed Notices of Objection for only 6 of these 60 Current Liens. SF-DCT has declined to follow these Court-approved Lien Procedures in the following respects:

(a) failing and refusing to comply with the provisions of Section 4.02(b) of the Lien Procedures by failing to honor MDL 926's liens for 53 of the 60 Current Liens for

which SF-DCT has not sent MDL 926 claimant-filed Notices of Objection or otherwise informed MDL 926 that its liens are deficient or invalid; or

(b) failing and refusing to comply with the provisions of Section 4.02(d) of the Lien Procedures by failing to provide MDL 926 with a copy of a Notice of Objection filed by the claimants for 53 of the 60 Current Liens.

Under the provisions of Section 4.02 of the Lien Procedures, SF-DCT should have either honored MDL 926's liens for 53 of the 60 Current Liens or provided claimant objections to said liens. SF-DCT has done neither.

Furthermore, the MDL 926 Claims Office has received **consents** to liens directly from an additional 3 Lien Claimants and/or their attorneys, one of which was a carbon copy of a letter sent to SF-DCT and one of which stated that consent had been previously faxed to SF-DCT. Despite this notification of consent directly from Lien Claimants and/or their attorneys, SF-DCT has failed to comply with the provisions of Section 4.02(c) of the Lien Procedures by failing to withhold the agreed amount from the claimant's payment. These omissions are contrary to the precedent SF-DCT set for itself during the period from September through December, 2005, when it paid 5 of MDL 926's liens either because the claimant consented to the lien or failed to timely object thereto. To the extent that SF-DCT's failure to continue its practice of payment for ripe MDL 926 liens is due to the fact that there is no current Lien Judge, there is no support in the Lien Procedures for such a position. Whether or not there is a current Lien Judge has no bearing on payment of MDL 926 liens which are properly filed and to which no timely objections have been filed by the claimant(s).

Finally, SF-DCT has not provided the Notice and Proof of Lien form to the MDL 926 Claims Office for the 104 remaining current liens filed by MDL 926 (the "Additional Current Liens"). MDL 926 does not know if this is because the claims are not ripe or is due to a decision by SF-DCT no longer to provide the forms to MDL 926. SF-DCT has also not complied with Section 4.02(d) of the Lien Procedures by not advising the MDL 926 Claims Office whether any of the claimants for the Additional Current Liens has filed any objection to an MDL 926 lien. MDL 926 does not know whether SF-DCT advised these claimants of the MDL 926 Claims Office liens as required by Section 4.02(a) of the Lien Procedures.

In the event that such Additional Current Liens are not ripe under Section 1.01 of the Lien Procedures, thus not yet triggering the provisions of Section 4 of said Procedures, SF-DCT has not provided the information to MDL 926 concerning the status of said Additional Current Liens. Thus, MDL 926 is unable to determine whether SF-DCT is in compliance with the Lien Procedures with respect to the Additional Current Liens. Given the failure of SF-DCT to comply with the Lien Procedures in other respects, MDL 926 cannot be sanguine in the belief that all of the Additional Current Liens are simply not yet ripe for payment.

The failure of SF-DCT either to comply with the Lien Procedures set forth by this Court, or to properly notify MDL 926 of the reasons for its non-compliance, fosters an environment whereby these 193 Lien Claimants may receive double payment from both the MDL 926 RSP and the Dow Settlement Plan, *i.e.*, double dipping.

As stated in the Motion, MDL 926 is not able to provide a more granular description of the 60 Current Liens due to SF-DCT's noncompliance with Section 4.02(a) of its own Lien Procedures. We reiterate our request for this documentation so that the Court, MDL 926, and not just SF-DCT, will know all the applicable facts pertaining to the validity of the 60 Current Liens.

III.

ARGUMENT

I. Implant Claimants Were Never Intended to be Allowed to Double Dip Benefits.

In the original Global Settlement, very little emphasis was placed on which Settling Defendant manufactured the implant set(s) received by the settlement class members. After Dow filed its Chapter 11 petition and withdrew from the Global Settlement, the MDL 926 Revised Settlement Program ("RSP") in *Lindsey v. Dow Corning* made clear to the settlement class members that identification of the manufacturer(s) of their implants was **now very** important. The RSP claimants were not to be paid for diseases resulting from Dow implants, for ruptures of Dow implants or for explantation of Dow implants. The RSP Notice directed the

claimants to file creditor claims in the Dow Chapter 11 proceeding to preserve their claims against Dow.

To ensure that only RSP (non-Dow) injuries were paid by MDL 926, claimants were required to complete a Proof of Manufacturer ("POM") Form for claimant benefit payments under the RSP and to provide supporting documentation regarding the manufacturer(s) of their implants. This POM form contained a statement that, by signing the form, the claimant swore under penalty of perjury that the information contained therein was true and correct. That is, the claimants subject to the 60 Current Liens, other than a small handful, stated, under oath, either that they did not have Dow implants or that the manufacturer of their implants was unknown. MDL 926, understandably, took them at their sworn word.

In the RSP, any disease claim to MDL 926 for a claimant who identified both RSP and Dow implant manufacturers on the POM was reduced by 50% by MDL 926 with the intention that the claimant could file a claim with Dow, and be paid by Dow if there was a Dow Settlement Plan and upon appropriate proof. If there never was to be a Dow Settlement Plan or if the claimant chose not to present her claim to Dow, or could not prove her claim to Dow, she was still not allowed to return to MDL 926 and receive the remaining 50% portion of her claim. Explantation and rupture benefits were paid by MDL 926 **only** for explantation of RSP implants and for RSP implant ruptures, not for Dow implants. This "no double dipping" principle was clearly set out IN THE BEGINNING in the RSP Notice sent to claimants.

SF-DCT, likewise, applies the "no double dip rule", reducing disease benefit payments to claimants with both Dow and RSP implants by 50% and paying only for explantation of Dow implants and for Dow implant ruptures, not for RSP implants. The guiding principle for benefit payments by both plans is that where RSP and Dow implants are involved, the "injury" under the disease benefits is equally attributed to both the RSP and the Dow implants because of the impossibility of determining whether only one set of implants actually caused the disease and, if so, which one. Thus, now that there is a Dow Settlement Plan in place, a claimant having both RSP and Dow implants would, upon presentation of proper proof to both the MDL 926 Claims Office and SF-DCT, receive a 100% disease benefit: (a) 50% from MDL 926 and (b) 50% from

SF-DCT, plus explantation and/or rupture benefits, as appropriate from the applicable settlement plan(s).

If there were no such parity in payment of benefits by the RSP and the Dow Settlement Plan, claimants would be clamoring to prove unfounded claims to the more generous settlement plan. The Dow Plan proponents, in their wisdom, carefully synchronized the Dow Settlement Plan to mirror and complement the RSP to avoid such a disparity.

Below, MDL 926 requests that this complementary Dow Settlement Plan, likewise, mirror the RSP for mistaken claimant overpayments, by refunding the excess to the overpaying Settlement, in good conscience, to prevent unjust enrichment to a claimant. Likewise, in the RSP, when a clamant is first thought to have Bristol implants only and is paid, but it later turns out that she has Baxter and Bristol, Bristol is refunded the 50% overpayment by Baxter. To mirror the RSP, and prevent claimant double dipping and gaming of the system, Dow should follow the same procedure here with MDL 926.

A. <u>The SF-DCT and the RSP Claims Offices carry out a complementary payment program, and, as such, potential overpayment of claims should be remedied by set-off</u>.

Even though Dow withdrew from the Global Settlement after its Chapter 11 filing, its initial payment of $42,500,000 remained in the *Lindsey v. Dow Corning* RSP for the time during which SF-DCT and MDL 926 shared a Claims Office, for payment of SF-DCT's share of administrative expenses.

Numerous discussions were held between MDL 926 and Dow representatives and Class Counsel regarding the composition of the Dow Settlement Plan until its finalization. As set forth in the Facts section hereinabove, initial plans were carried out to have SF-DCT share office space and personnel with the MDL 926 Claims Office. Sharing of administrative and financial oversight responsibilities was also discussed extensively.

Although SF-DCT later decided to have separate office space and personnel, the claims processing, quality control and fraud protocols of SF-DCT remain based on the RSP protocols, and SF-DCT is authorized to consult with the MDL 926 Claims Administrator to make SF-

DCT's interpretations of claims consistent with those of the MDL 926 Claims Office. The two offices were intended to work as complementary facilities in the treatment of claims so that Dow claimants would be treated the same as RSP claimants, and vice versa, with the minor exception of non-disease benefits.

More significantly, SF-DCT disease benefits mirror RSP disease benefits. A determination was made as early as the approval of the Dow Plan in 2004 that the same value was placed on injuries to Dow implant recipients as on injuries to RSP implant recipients. As such, despite Dow's Chapter 11 Reorganization, the disease benefits for Dow implant recipients were not reduced below RSP disease benefits for the same injuries. For purposes of ongoing benefits, SF-DCT and MDL 926 work in tandem to provide, in total, 100% disease benefits to claimants with sufficient proof of both Dow and RSP implants. See copies of the RSP benefit grid and the Dow Settlement Plan benefit grid attached hereto as **Exhibit G** and incorporated herein by reference.

The two Settlement facilities no longer share a common office and one payroll, but their complementary claimant payment programs remain intact and ongoing.

Payment by SF-DCT of its full disease benefit to the 60 Lien Claimants, after these claimants have previously received a 100% disease benefit from MDL 926, and without refunding to MDL 926 its resulting 50% overpayment, is directly contrary to the stated purposes of both Settlement Plans, and would cause one participant in a complementary Settlement Benefit Program to pay greatly in excess of the payment by the other participant of the Settlement Benefit Program. Such a windfall to a Lien Claimant would artificially inflate the value of the claimant's injury beyond that contemplated by either Settlement in its benefit grid, discriminating not only against MDL 926 but against nearly 90,000 other RSP claimants who submitted more accurate POM information. The only way to achieve parity, as specifically intended by the written benefits of the Dow Settlement Plan, is to allow a set-off in favor of MDL 926 from the benefits due Lien Claimants from SF-DCT.

The most efficient, reasonable and equitable remedy to avoid overpayment is to allow such a set-off. SF-DCT has already recognized the equitable soundness of this remedy, by reimbursing MDL 926 for 5 of its Lien Claimants. Not to apply the same remedy to the

remaining 60 Current Lien Claims would discriminate against the 5 who already paid off their MDL 926 Lien Claims, which SF-DCT found to be valid, inexplicably not doing so for the other 60 Current Liens.

Clearly, under the express language of the two Plans, no claimant is entitled to such a windfall, and it should therefore be refunded to MDL 926.

B. MDL 926 is entitled to an equitable lien on claimant funds held by SF-DCT for overpayment of benefits by MDL 926 to double dippers.

The equitable doctrine of unjust enrichment holds that a person is unjustly enriched upon receiving benefits to which he or she is not entitled unless that person makes restitution or pays the value of the benefit to the person contributing the benefit. *Penick v. Penick*, 783 S.W.2d 194, 197 Tex. 1988. Allowing the Lien Claimants to collect full benefits from SF-DCT, and not to reimburse the resulting 50% overpayment to MDL 926, would cause these lucky claimants to be paid the same benefit twice for the same injury, a result which was never intended by either the RSP or the Dow Settlement Plan. A clearer example of unjust reimbursement than this blatant double dipping cannot be imagined. The Lien Claimants will be unjustly enriched if allowed so to double dip by retaining the 100% benefit paid by MDL 926 on the sworn written assertion by each claimant that she had no Dow implants and then receiving the full benefit due SF-DCT claimants by asserting that she does, in fact, have Dow implants after all. This unjust enrichment would be to the detriment of all other RSP claimants and all other SF-DCT claimants.

As stated above, the RSP and the Dow Settlement Plan carry out complementary payment programs to provide a parity of benefits for claimants with both RSP and Dow implants. A very small minority of claimants, in both Settlement Plans, have attempted to game the system by obtaining a greater benefit from the two Settlement Plans than that paid to nearly 90,000 other claimants. This is not the intent of either Settlement Plan. It results in a claimant being unfairly paid twice for the same injury, it is unjust enrichment, and it needs to be remedied by this Honorable Court. Equity, being as long as the Chancellor's Foot, provides the remedy, as

discussed below. For most of the 60 Current Liens, it is impossible to determine whether the information provided by the claimant to the MDL 926 Claims Office on the POM form:

(1) was deliberately or negligently false (*e.g.*, claimant failed to list all implants on the POM or did not undertake all possible efforts to locate medical records to identify unknown implants); or

(2) resulted from the claimant's inability to ascertain the true facts due to errors in medical records (*e.g.*, medical records showed that RSP implant inserted; explant records show Dow implant removed); or

(3) was the result of apparent error by MDL 926.

The end result, in all 60 Current Lien cases, is that the claimant has already received a 100% benefit from MDL 926 - 50% more than was due. Payment of full benefits to these Lien Claimants by SF-DCT would cause the Lien Claimants to receive benefits totalling 150% from MDL 926 and SF-DCT, greater than that contemplated by either Plan and greater than the benefit received by all other RSP and Dow claimants for comparable injuries who accurately completed their POM forms and expended all efforts necessary to provide medical records identifying their implant manufacturers.

Under *Richards v. Suckle*, 871 S.W.2d 239 (Tex.App-Houston 1994), an equitable lien may be imposed when "a court of equity implies an agreement arising out of the relationship of the parties and the circumstances of their dealings." *Id*. at 241. Such a lien is based on a contract, express or implied, either made by an authorized person or arising by implication from her actions and dealing with or operating on specific property of the person affected by the lien. *Id*. The RSP Notice informed MDL 926 claimants that the benefits due the claimants from the RSP would be reduced by 50% if they had both RSP and Dow implants, and the RSP POM required the claimant to agree, under written oath, that this was not the case. Here, a written agreement, and not merely an implied agreement, was created.

After receiving the RSP Notice, the Lien Claimants, along with all other MDL 926 claimants, had the opportunity to opt-out of the RSP and pursue their claims against the manufacturers themselves outside of the RSP and the limitations on benefits due under the RSP. Declining to opt-out of the RSP limited the Lien Claimants to the benefits provided by the RSP,

which benefits were described in the RSP Notice and reduced by 50% in the event the Lien Claimants had both Dow and RSP implants. By not opting-out of the RSP, the Lien Claimants entered into an implied agreement with MDL 926 as to the scope of the benefits due them and the limitations on such benefits. A Court of Equity is to look to the relationship between the parties and their dealings in "establishing a lien based on rights and justice." *Bray v. Curtis*, 544 S.W.2d 816, 819 (Tex.Civ.App.-Corpus Christi 1976), writ refused n.r.e. (1977). See also, *The First National Bank in Big Spring v. Conner*, 320 S.W.2d 391 (Tex.Civ.App.-Amarillo 1959), writ refused n.r.e. An equitable lien in favor of MDL 926 is therefore due to be imposed, in Equity, on payments due the Lien Claimants from SF-DCT.

Equitable liens result from applying the equitable maxim of "Equity regards as done that which ought to be done." *Luse v. Rea*, 207 S.W. 942 (Tex. Civ. App.-Amarillo 1918), writ granted (1919), aff'd *Rea v. Luse*, 231 S.W. 310 (Tex.Com.App. 1921). Whether the Lien Claimants deliberately or negligently falsified their submissions to MDL 926, they innocently or intentionally defrauded MDL 926 of monies paid out to the Lien Claimants in excess of what was due under the RSP, the sister claimant payment program with SF-DCT.

To the extent that certain of the Lien Claimants were truly ignorant of the identity of the manufacturers of their implants at the time of receipt of payment from MDL 926, upon their determination that Dow was a manufacturer of one or more of their implants, the Lien Claimants (except as noted in Exhibit F) did not amend their previous submissions to the RSP made under penalty of perjury or notify the MDL 926 Claims Office of the error in their previous submissions. Nor did they refund one-half of the monies received from MDL 926, the amount of the resulting overpayment. Under *Williams v. Greer*, 122 S.W.2d 247 (Tex.Civ.App.-Dallas 1938),

> [when] one [is] deprived of the possession of real or personal property by artifice or fraud of another, equity implies and declares out of general consideration of right and justice, as between the parties, a lien on the property to secure the charge legally or equitably assessed against it. It is not necessary that a lien is created by express contract or by operation of [a] statute; courts of equity will apply the relations of the parties and the circumstances of their dealings in establishing a lien based on right and justice.

Id. at 248.

This Court may apply these equitable principles and impose a lien in favor of MDL 926 upon SF-DCT proceeds due the Lien Claimants to prevent the Lien Claimants from "double dipping" from the RSP and the Dow Settlement Plan, and to require, in Equity and good conscience, to be done that which ought to be done.

In the alternative, the Court may allow MDL 926 to be equitably subrogated to the Lien Claimants with respect to the proceeds due them from SF-DCT under *Richards v. Suckle*, 871 S.W.2d 239 (Tex.App.-Houston 1994), and further allow the enforcement of MDL 926's subrogation rights by a Lien Judge. Here, the relationship, the circumstances and the dealings between each of the 60 Current Lien Claimants and both MDL 926 and SF-DCT, and the complementary working relationship of the two Facilities in executing mirror-image claimant payment programs so as to prevent double dipping results in an agreement by the claimant not to be double-paid per a sworn written agreement on the RSP POM and an implied agreement by one Facility to repay the other for an overpayment to prevent injustice.

It's like a Chevy dealership with a repair shop and a body shop for a wrecked vehicle needing repairs and body work. If the customer overpaid for repairs, the body shop should credit the overcharge on its bill, in Equity and good conscience.

C. <u>As Officers of this Court and Fiduciaries for Both Settlements, Counsel Representing 33 of the 60 Current Lien Claimants Are Duty Bound to Refund the Windfall to MDL 926, and Should Not Be Double-paid, in Violation of the Fee Caps for Both Settlements.</u>

Of the 60 Current Lien Claimants, 33 are represented by Counsel. See, Exhibit F. This Section applies to these Lien Claimants.

As officers of the Court, attorneys act in a fiduciary capacity in any proceeding before a Court. Such fiduciary capacity requires that the attorney not mislead the Court, not present false evidence before a Court, and especially, not commit fraud in any Court proceeding. An attorney may not escape his or her responsibility in this regard by allowing his or her client to commit any such acts in a Court proceeding. In fact, an attorney has a special responsibility to take or refrain

from certain actions when the attorney is reasonably sure that his or her client intends to commit perjury in Open Court. This responsibility is certainly not diminished with respect to filings the client may make in a court proceeding, including claimant filings with the RSP and the Dow Settlement Plan, both of which are being conducted under the auspices of the Federal District Court of the Northern District of Alabama and the Federal District Court of the Eastern District of Michigan.

These tenets are contained in Rule 3.3 of the American Bar Association Model Rules of Professional Conduct, as follows:

> Rule 3.3 Candor Toward the Tribunal
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> ...
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[Confidentiality of Information].

> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The RSP POM requires that all claimants declare under penalty of perjury the identity of the respective manufacturer(s) of their implants and provide supporting medical records documenting said manufacturer(s). Thirty-three of the claimants who are subject to the 60 Current Liens were represented by counsel, and they are identified in Exhibit F. It goes without saying that said counsel, like claimants, have obligations of truthfulness and accuracy with respect to the identity of said implant manufacturer(s).

Lien claimants who failed to truthfully identify all manufacturers of their implants on the POM and supporting medical documentation by apparently selectively submitting different information to the RSP and the Dow Settlement Plan, or who failed to make all necessary efforts to obtain manufacturer information and/or supporting medical documentation in the RSP but were somehow able to obtain same for the Dow Settlement Plan, may be deemed to have committed fraud. Their counsel, however, have a higher duty to the Court and may be said to have committed fraud in such instances.[3]

Furthermore, counsel for these claimants are aware of fee limitations in both Settlement Plans. Any attempt by such counsel to aid and abet any claimant in receiving more than 100% of disease benefits could be deemed to be in violation of these fee limitations.

Based on this higher duty of attorneys and the cap on attorneys' fees, to the extent that this Court determines that MDL 926 is not due an equitable lien with respect to any of the 60 Current Liens, any Additional Current Liens, or any Future Liens, said counsel should be required to refund to MDL 926 any windfall received by any claimant as a result of double dipping in the Dow Settlement Plan and any fees received by said counsel in excess of the fee limitations of said plans.

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[3]These conclusions obviously would not apply to any claimant (or her counsel) whose medical records showed an RSP implant, but upon explantation, the implant was determined to be a Dow implant, except to the extent that a claim was made to Dow without agreeing to a refund to MDL 926.

III.

CONCLUSION

All 60 Current Lien Claimants are already paid in full. At issue is whether they should enjoy a windfall not realized by over 100,000 claimants not in such a position to game the system, by receiving 150% of what they are due.

Thousands of claimants truthfully, faithfully and equitably complied with the RSP and Dow Settlement Plan claimant benefit payment requirements and did not attempt to obtain excess implant benefits. To date, less than two hundred Lien Claimants did not comply with the RSP and Dow Settlement Plan requirements and, without enforcement of either a set-off or equitable lien in favor of MDL 926, may obtain excess implant benefits equal to 150% of what they are due under the two tandem Settlement Plans. The Court, in the interest of preserving the integrity of its own judgments, and the equal treatment of all claimants, has a duty to enforce the terms and the intent of the Settlements. Otherwise, a handful of claimants and their lawyers would be allowed to game the system.

This small minority of Lien Claimants, or their counsel, cannot be permitted to manipulate the Settlements in order to obtain a windfall not otherwise available to any other class member.

Therefore, this Honorable Court is respectfully requested to grant the Motion of MDL 926 with respect to the imposition and enforcement of the MDL 926 Liens against SF-DCT payments to the Lien Claimants.

Respectfully submitted this the 29th day of June, 2007.

ALLARD & FISH, P.C.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE	)	**Case No. 00-CV-00005-DT**
	)	**(Settlement Facility Matters)**
	)	
DOW CORNING CORPORATION	)	**Hon. Denise Page Hood**
	)	
Reorganized Debtor	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have, this 29th day of June, 2007, served a copy of the foregoing Motion and Exhibits B and C thereto (with Exhibit A being provided in camera only to the Court, the two Claims Administrators and the Claimants' Advisory Committee) and Memorandum Brief and Exhibits A through G (with Exhibit F being provided in camera only to the Court, the two Claims Administrators and the Claimants' Advisory Committee) on each of the following by sending a copy of same by first class U.S. Mail, postage prepaid, to the addresses indicated:

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In addition, the above-listed Parties were served this day by e-mail.

At the instruction of SF-DCT, the 43 Lien Claimants identified in proprietary Exhibit A, were served this 29th day of June, 2007, by First Class Mail, postage prepaid, with a copy of this Motion and supporting Brief, and this Court's June 18, 2007 Order establishing this proceeding, and the Claimants' Advisory Committee's letter of explanation in Exhibit C, at the best address available using SF-DCT information; and

At the instruction of SF-DCT, the 43 Lien Claimants identified in proprietary Exhibit F, were served this 29th day of June, 2007, by First Class Mail, postage prepaid, with a copy of this Memorandum Brief at the best address available using SF-DCT information

/S/ Edgar C. Gentle, III, Esq.

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