UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MOTION TO RECONSIDER AND VACATE ORDER TO SHOW CAUSE AND RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO FINANCE COMMITTEE'S MOTION FOR ORDER TO SHOW CAUSE WITH RESPECT TO LAW FIRMS AND COUNSEL WHO HAVE FAILED TO RESPOND TO THE AUDIT SURVEY REQUIRED BY CLOSING ORDER 4

For the reasons set forth in the attached memorandum, the Claimants' Advisory Committee ("CAC") respectfully requests that the Court reconsider the granting of the Finance Committee's Motion for Order to Show Cause with Respect to Law Firms and Counsel Who Have Failed to Respond to the Audit Survey Required by Closing Order 4 [ECF No. 1697] (the "OTSC Motion"), vacate the resulting Order to Show Cause [ECF No. 1699], and upon reconsideration deny the OTSC Motion.

Dated: March 31, 2023

Respectfully submitted,

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

PROPOSED ORDER OF CLAIMANTS' ADVISORY COMMITTEE VACATING ORDER TO SHOW CAUSE AND DENYING FINANCE COMMITTEE'S MOTION FOR ORDER TO SHOW CAUSE WITH RESPECT TO LAW FIRMS AND COUNSEL WHO HAVE FAILED TO RESPOND TO THE AUDIT SURVEY REQUIRED BY CLOSING ORDER 4

The Court has considered the Motion to Reconsider and Vacate Order to Show Cause and Response of Claimants' Advisory Committee to Finance Committee's Motion for Order to Show Cause with Respect to Law Firms and Counsel Who Have Failed to Respond to the Audit Survey Required by Closing Order 4, ECF No. 1697 ("OTSC Motion"), and the Court finds that the OTSC Motion was improvidently granted before the time for motion responses had run and now should be denied without prejudice.

ACCORDINGLY, it is hereby

ORDERED that the Court's Order to Show Cause dated March 29, 2023, ECF No. 1699, is VACATED, and it is further

ORDERED that the OTSC Motion is DENIED without prejudice.

DATED: _____

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER AND VACATE ORDER TO SHOW CAUSE AND RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO FINANCE COMMITTEE'S MOTION FOR ORDER TO SHOW CAUSE WITH RESPECT TO LAW FIRMS AND COUNSEL WHO HAVE FAILED TO RESPOND TO THE AUDIT SURVEY REQUIRED BY CLOSING ORDER 4

CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the Court erred in granting the OTSC Motion before the conclusion of the 14-day period for responses provided by Local Rule 7.1(e)(1)(A)?

Movant-Respondent's Answer: Yes

2. Whether the Court should issue an Order to Show Cause to potentially hold hundreds of law firms and lawyers in contempt for failing to respond to a survey when it is likely, due to the passage of time, that many non-responding firms never received the survey; an investment of time updating addresses and conducting individualized outreach would likely yield substantially more responses and recover more funds; and holding firms in contempt *en masse* without individualized proof that they received and disregarded the Court's prior order would be inappropriate and unfair.

Movant-Respondent's Answer: The Court should decline to issue the requested Order to Show Cause.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Closing Order No. 4 [ECF No. 1640].
- Local Rule 7.1(e)(1)(A).
- Local Rule 7.1(h)(2)(A).
- *English v. Cowell*, 10 F.3d 434 (7th Cir. 1993).
- *Gascho v. Global Fitness Holdings, LLC*, 875 F.3d 795 (6th Cir. 2017).
- *NLRB v. Center Construction Co.*, 2013 WL 7963724 (E.D. Mich. Oct. 31, 2013).

The Claimants' Advisory Committee ("CAC") respectfully requests that the Court reconsider and vacate its Order to Show Cause [ECF No. 1699] and deny the Finance Committee's Motion for Order to Show Cause with Respect to Law Firms and Counsel Who Have Failed to Respond to the Audit Survey Required by Closing Order 4 [ECF No. 1697] (the "OTSC Motion").

INTRODUCTION

The CAC supports the goal of recovering any undelivered settlement payments held by lawyers, as intended by both the Settlement Plan and Closing Order 4, and understands that the OTSC Motion is intended to accomplish that without unduly burdening the Settlement Facility – Dow Corning Trust ("SF-DCT"). However, a mass survey and contempt proceeding on the scale proposed by the OTSC Motion, reaching back over two decades of claim payments to require, in many cases, responses with respect to long-closed claim files, appears to be unprecedented. The CAC has concerns regarding the efficacy and fairness of this novel procedure, which it previously shared with the Finance Committee in response to a draft of the OTSC Motion, leading it to conclude that it would be inappropriate and counter-productive to issue the requested Order to Show Cause ("OTSC") at this time.

The CAC was preparing to submit its Response to the OTSC Motion when the Court granted the motion and entered the Order to Show Cause on March 29, 2023 [ECF No. 1699], prior to the running of the 14 days provided by the

Local Rules for motion responses. The CAC thus respectfully requests that the Court vacate the Order to Show Cause and consider this response to the OTSC Motion on the merits.

ARGUMENT

1. THE COURT SHOULD RECONSIDER AND VACATE THE PREMATURE GRANTING OF THE OTSC MOTION

Motions for reconsideration of non-final orders, while generally disfavored, may be brought under Local Rule 7.01(h)(2)(A) when "[t]he court has made a mistake" that changed the outcome of its decision.

Local Rule 7.1(e)(1)(A) provides that responses to all motions (other than those with a longer response time under Rule 7.1(e)(2)(A)), must be filed within 14 days. The OTSC Motion was filed and served on March 21, 2023, and responses were thus due on April 4, 2023. The Court nevertheless granted the OTSC Motion and entered the Order to Show Cause on March 29, 2023, only eight days after the OTSC Motion was filed. This was error unless all parties in interest concurred in or had waived their right to be heard on the OTSC Motion. *See English v. Cowell*, 10 F.3d 434, 435-36, 438 (7th Cir. 1993) (where trial court entered judgment before any opposing brief was filed, court vacated motion because "[t]he opportunity to respond is deeply imbedded in our concept of fair play and substantial justice" and "the harmless error doctrine does not save

premature rulings when the loser did have something substantial to say in opposition").

The CAC is empowered to participate in all SF-DCT matters and to be heard on all matters "in respect of the obligations in the Plan and Plan Documents." Settlement Facility Agreement § 4.09(c). The CAC was not a signatory to nor did it provide its concurrence in the OTSC Motion. The Court thus erred in ruling on the OTSC Motion without giving the CAC a chance to file a response within the 14-day period.

This error potentially altered the outcome of the OTSC Motion, warranting reconsideration. As discussed below, the CAC has significant concerns about the OTSC Motion based on its decades of experience in the Dow Corning litigation, bankruptcy, and settlement, which it shared with the Finance Committee and Debtors' Representatives prior to the filing of the OTSC Motion. The CAC had prepared a Response to the OTSC Motion that it believed would be helpful to the Court and planned to file before the April 4 deadline. The Court's premature granting of the OTSC Motion foreclosed the CAC from providing this potentially outcome-altering input.

The CAC therefore respectfully requests that the Court reconsider its decision, vacate the Order to Show Cause, and consider the CAC's Response to the OTSC Motion on the merits.

2. THE COURT SHOULD DENY THE OTSC MOTION AND DIRECT THE SF-DCT TO TAKE MORE TARGETED ACTIONS TO ENFORCE CLOSING ORDER 4

The CAC respectfully suggests that the OTSC Motion should be denied for three interrelated reasons:

First, based on the CAC's experience over the past two decades in this settlement and three decades in the breast implant litigation, there are legitimate reasons that could explain why the SF-DCT did not receive responses from a significant number of firms and lawyers included in its mailings. Therefore, the CAC believes that before taking any further steps to enforce compliance with Closing Order 4, the SF-DCT should update and verify the current addresses of non-responding law firms in a manner similar to what it has done with updating claimant addresses before claims were closed. *See* Closing Order 2, dated March 19. 2019 [ECF No. 1482].

Just as the SF-DCT has experienced a high volume of claimants who have moved and did not provide a forwarding address, many law firms have likewise closed, merged with other firms, changed names, been dissolved, or moved – some of them long ago. Forwarding addresses are valid with the U.S. Postal Service for only six months. If a law firm changed its address years ago, the audit survey would not have been forwarded to the new address, and might or might not have been returned to the SF-DCT as undeliverable or a bad address. Moreover, law firms that had no further claim submissions pending with the SF-

DCT would have had no reason to update their address. Thus, it is not appropriate to assume, as the OTSC Motion does, that all of the firms listed in sealed Exhibit 1A received the mailing but declined to respond.[1]

In addition, the CAC is aware from its prior experience on this issue in this settlement and from numerous calls to the CAC and updates in attorney names for the CAC's newsletter over two decades that many attorneys who initially handled claims with the SF-DCT in the early 2000s have either retired, passed away, are now physically or mentally disabled, changed law firms, or their firm has merged or dissolved into separate law firms. In addition, some attorneys have been suspended or removed from practicing law and therefore are no longer at the address listed in the SF-DCT system. All of this is to be expected in a settlement that has spanned 30 years: The MDL-926 settlement started in 1993,

[1] For example, if any firms on the list received payments only on behalf of Class 9 and 10 claimants, then those payments were, for the overwhelming majority, completed in 2010 – 13 years ago. It is probable that claim files for these claimants were destroyed by law firms after seven years, as allowed by most state laws. Since Class 9 and 10 settlements were closed well over a decade ago, the law firms had no reason to send any address changes to a settlement fund in which they had no further claim. *See Consent Order to Establish Guidelines For Distribution From, and to Clarify The Allocation of, the Covered Other Products Fund*, filed Dec. 12, 2007 [ECF No. 605] (authorizing final distributions to Covered Other Product Claimants). The same is true for Class 7, which closed in 2015. *See Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Materials Claimants' Fund*, filed Dec. 3, 2015 [ECF No. 1227] (closing Class 7 fund and establishing procedures to resolve final claims; vast majority resolved through Expedited Release (7,216), Foreign Gel Claim Payments (652), and Disease Cash Out Offer payments (6,076) in 2006-2007, followed by similar payment offers to 6,235 "Disputed Marshalling Claimants" in 2016).

the Dow Corning bankruptcy proceedings began in 1995, and the SF-DCT mailed claim forms to Settling Claimants in 2003.

Any or all of these events could explain why a law firm or attorney may not have received the audit survey. The CAC thus believes that an investment in updating and verifying addresses prior to taking any further steps would have the most positive effect on the response rate from the remaining firms instead of mailing an order to show cause to addresses or law firms that may well be defunct. The SF-DCT has an existing protocol for claimant address issues, *i.e.*, researching a claimant's address using two or more sources. This same protocol can be applied to updating law firm addresses, and this can be accomplished quickly and efficiently without undue burden on the SF-DCT.

Indeed, the CAC did just that in 2017-2018, when the SF-DCT's Quality Assurance Department requested its assistance in contacting attorneys who received the first round of Premium Payments, for which claimant address verification had not been required. The CAC reached out to law firms by sending an email to the last known attorney email address, and followed up at the last known attorney phone number. If the attorney was not immediately reached, the CAC entered the name in a search engine and reviewed online state bar attorney records. This process was simple, efficient, and productive. When contacted by the CAC, the vast majority of law firms responded promptly with documentation

about payment distributions. A similar process here could yield an updated contact list within 30 days for further outreach.[2]

Second, the CAC believes that, before escalating to an OTSC, the SF-DCT should build on the updated address research described above to conduct individualized outreach, providing non-responsive firms with specific information to assist them in responding. The CAC's 2017-2018 outreach was successful, in large measure, because each law firm was provided detailed information, including claimant name, SID number, payment date, payment amount, and the type of claim payment that was approved. Providing the same information now to non-responding firms will substantially enhance their ability to respond with useful information.

This is particularly appropriate now, given the many years that have elapsed since many firms received payments. The CAC has personal knowledge from its role in the settlement that there has been significant turnover in attorneys who handled the claims over the past twenty years. Claimant files have also been destroyed by many law firms within the time frame allowed by state law, thus

[2] The CAC – with limited resources – was able to obtain results for virtually all of the law firms contacted in 2017-2018. The SF-DCT, with several staff members who have largely completed claim processing, has greater capacity than the CAC to contact law firms directly in the same manner that was requested of the CAC. In addition, the CAC has offered to assist the SF-DCT in this process and believes that direct mailings to targeted groups of firms with updated addresses, as described below, could be completed within 30 days.

making it difficult to respond to a generic survey that did not provide any claimant names or identifiers, payment information, or other information that could have assisted the law firm in locating the relevant information. Without any of these specifics, and given the passage of time, it was likely difficult or even impossible for some law firms to respond meaningfully to what appears to be an unprecedented survey in a mass tort bankruptcy settlement that spanned decades.

While the CAC understands that processing all of this information for the entire list of non-responding firms could be daunting, the task will be more manageable if the SF-DCT prioritizes the relatively smaller number of firms that received the largest amounts. Based on the CAC's review of the current list of 800-plus non-responding firms (some of which are listed more than once at different addresses), 13 firms (those receiving at least $1 million) account for approximately $41 million of the $71 million in payments made to this list of firms, and the top 79 firms (those receiving at least $100,000) account for nearly $59 million – 83% of the amount sent to the firms listed in Exhibit 1A. In contrast, 294 firms were paid $5,000 or less, for a total of only approximately $648,000 – mostly for Expedited Release Payments, Foreign Gel Claimant Payments, or

Disease Cash-Out Payments, for which no attorney fees were allowed, and most of which were paid in 2006.[3]

Third, the CAC is further concerned about the appropriateness of threatening to hold hundreds of law firms in contempt *en masse* without individualized showings that they in fact disregarded a court order. As noted, approximately 300 firms on the list received a single payment, fifteen or more years ago, most under $5000, and many other law firms received two or three payments of relatively small amounts many years ago as well. While the CAC agrees that any firm actually receiving the survey should have responded, it is likely that many such firms no longer exist or moved long ago. Those that had no outstanding claims had no obligation to update their addresses with the Settlement Facility. The Motion creates the unfortunate impression of a widespread problem when in fact the bulk of the remaining listed firms may never have received the prior mailings.

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[3] For example, more than 300 of the 800-plus law firms received a *single payment* over the 20-year life of the SF-DCT. 76 firms received a single payment of $600, which was the amount of the Foreign Gel Claimant Payment in Class 7 made in 2006, 17 years ago (from which no attorney fees were permitted), and 33 of these firms are located outside of the U.S. Likewise, 27 law firms received a single payment of $3,000, the amount of the Disease Cash Out Payment in Class 7 that was made in 2006-2007, and, of these, 11 are located outside of the U.S. The CAC questions the value of using SF-DCT resources – and seeking contempt sanctions – to pursue law firms that received a single nominal payment 16-17 years ago and never had another claim with the SF-DCT.

In these circumstances, holding firms in contempt based only on their failure to respond to another mass mailing would be unreasonable and unfair. The contempt power is "serious" and "[a] party that seeks civil contempt must demonstrate by clear and convincing evidence that the opposing party 'violated a definite and specific order of the court.'" *Gascho v. Global Fitness Holdings, LLC*, 875 F.3d 795, 799-800 (6th Cir. 2017) (citing *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6th Cir. 1987). "A party must have actual knowledge of the court's order to be held in contempt of that order." *NLRB v. Center Construction Co.*, 2013 WL 7963724, at *4 (E.D. Mich. Oct. 31, 2013).

While Closing Order 4 is clear, the mere failure of a firm on the list to respond to a further mass mailing is not clear and convincing evidence that it received and ignored that order. At minimum, the CAC believes that no attorney or firm should be held in contempt without an individualized showing that the OTSC was delivered to a current address of an active firm. The CAC notes that the proposed mailing list filed under seal includes several changes and additions from the prior list provided, giving rise to the possibility that firms or attorneys may be held in contempt based on failing to respond to the *first* mailing sent to them – and without any verification that the new address is current or accurate. This is yet another reason why the CAC believes the OTSC Motion is ill-advised and potentially unfair.

CONCLUSION

For the foregoing reasons, the Court should vacate the previously granted Order to Show Cause and deny the OTSC Motion.

Dated: New York, New York
March 31, 2023

Respectfully submitted,

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I certify that on March 31, 2023, I electronically filed a copy of the foregoing Motion to Reconsider and Vacate Order to Show Cause and Response of Claimants' Advisory Committee to Finance Committee's Motion for Order to Show Cause with Respect to Law Firms and Counsel Who Have Failed to Respond to the Audit Survey Required by Closing Order 4 through the Court's electronic filing system, which will send notice and copies of the aforementioned document to all registered counsel in this case.

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