

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:

**SETTLEMENT FACILITY DOW
CORNING TRUST**



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

Hon. Denise Page Hood

**REPLY IN FURTHER SUPPORT OF 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 Finance Committee (“FC”) respectfully submits this Reply to the Response of the Claimants’ Advisory Committee (“CAC”) to the 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. 1703 (“CAC Response”).

BACKGROUND

On March 21, 2023, the FC filed its Motion for Order to Show Cause, ECF 1697 (“FC Motion”). The FC Motion sought an order requiring 814 attorneys to appear before the Court and show cause why they should not be held in contempt for failure to provide an Audit Survey response as ordered by this Court in Closing Order 4, ECF No. 1640. The CAC Response was filed on March 31, 2023. Therein, the CAC claims to support efforts to recover undelivered settlement payments held by attorneys but in reality, the CAC frustrates the enforcement of Closing Order 4

and the identification of undelivered payments by blocking the show cause proceedings. The CAC Response asserts a host of additional procedures it argues must be implemented before the FC obtains an order to show cause. As demonstrated below, the CAC's proposed procedures are unnecessary given the thorough and fair steps already taken to obtain Audit Survey responses, are unduly burdensome on the SF-DCT, and would lead to disparate treatment of attorneys in a manner inconsistent with Closing Order 4.

ARGUMENT

I. SHOW CAUSE PROCEEDINGS ARE NECESSARY TO ENFORCE CLOSING ORDER 4

The SFA provides that all funds in the Trust shall remain under the custody and supervision of the Court until such time as the funds have actually been paid to and received by a Claimant. *See* Exh.1, SFA §10.09. In advance of closing the Settlement Facility, the FC has prioritized identification and recovery of any undistributed settlement payments held by attorneys with the goal of being able to report to the Court at closing that all assets of the Settlement Fund are accounted for properly. The FC Motion is the culmination of a long-term effort started in 2019 to identify undistributed settlement payments held by attorneys through the use of an Audit Survey form. *See* Exh. 2, April 25, 2023 Declaration of Kimberly Smith-Mair (“Smith-Mair Reply Dec”) at ¶¶5-6. The SF-DCT sent the Audit Survey to over 4,000 attorneys, received thousands of responses, and presently, there are 814

attorneys who have failed to respond. On September 7, 2021, the SF-DCT emailed the Audit Survey to attorneys who had cashed a least one settlement payment check and who had email addresses on file with the SF-DCT, or whose email addresses were discovered after two rounds of research. *Id.* at ¶¶7-10. On April 1, 2022, when it entered Closing Order 4, the Court validated the distribution of the Audit Survey as “the most efficient way to implement the audit and return of funds required by Closing Order 2.” ECF No. 1640, PageID.28795. The SF-DCT then conducted two mailings to the appropriate attorneys to provide Closing Order 4 and an Audit Survey for completion. Smith-Mair Reply Dec. at ¶¶16-19.

Based on allegations in the FC’s Motion that 814¹ attorneys received Closing Order 4 but failed to submit the Audit Survey, it is appropriate for the Court to issue an Order to Show Cause. *See Mercer v. Mitchell*, 908 F.2d 763, 768 (11th Cir. 1990) (“[i]f the court finds that the conduct as alleged would violate the prior order, it enters an order requiring the defendant to show cause why he should not be held in contempt and conducts a hearing on the matter.”). Moreover, show cause proceedings are now necessary, following the exhaustive Audit Survey process, for the Court, the FC, and the parties, if they are to ensure the Settlement Fund’s assets

¹ The list of 814 attorneys does not contain attorneys with addresses that generated undeliverable mail, or attorneys who have responded to the SF-DCT with a completed survey or an explanation of an inability to complete the Audit Survey. Smith-Mair Reply Dec at ¶20.

are properly accounted for by closing. It is paradoxical and confusing that the CAC, which purports to represent the interests of claimants, is advocating on behalf of lawyers who have potentially flouted Closing Order 4 rather than cooperating with recovery of claimant funds.

Relatedly, the FC regrets that the unintended concurrence omission in the FC Motion contributed to the Court issuing an Order for Show Cause before the CAC filed its opposition. The FC did not anticipate either party would file an objection. During a Closing Committee meeting, a member of the CAC indicated they would raise concerns with the FC Motion during the March 16, 2023 Status Conference. *Id.* at ¶23. Therefore, the FC sent an email to the CAC two days before the Status Conference providing the motion would be filed on March 21, 2023—five days after the Status Conference. *Id.* The CAC never asked for the issue to be added to the Status Conference agenda prepared for the Court, nor was the Court and the FC advised that an objection would be filed; had the FC known, it would have added it to the agenda. *Id.* After the Status Conference, the FC concluded the CAC was no longer pursuing their concerns. *Id.*

II. THE CAC’S DEMANDS FOR ADDITIONAL PROCEDURES ARE ENTIRELY UNREASONABLE

The CAC Response argues that before show cause proceedings move forward, the FC should reduce the number of attorneys it pursues for ignoring Closing Order 4 by excluding attorneys based on when they received settlement checks and the

total amount of the checks they received. Closing Order 4 contains no such exceptions—all attorneys who received settlement payment checks are subject to its requirements. Accordingly, it is inappropriate for the FC to cherry-pick who may be held accountable for non-compliance and who may not. The decision regarding who should be held in contempt and who should be excused is the Court’s province.

Next, the CAC insists that the SF-DCT invest additional resources in updating and verifying attorney addresses, emails, and phone numbers presumably for purposes of mailing Closing Order 4 and the Audit Survey again. This ignores the substantial time and resources the SF-DCT (and others) has already invested researching attorney contact information and obtaining Audit Survey responses. The SF-DCT hired outside vendors to research attorney email addresses and to build a platform to email the Audit Survey. *Id.* at ¶¶8-9. Dow Silicones provided and managed a group of paralegals to research email addresses for 2,424 attorneys. *Id.* at ¶9. With these efforts, the SF-DCT was able to email the Audit Survey to 1,660 attorneys. *Id.* at ¶10. Later, the SF-DCT mailed Closing Order 4 and the Audit Survey form twice to attorneys who either had not responded to the emailed survey, or for whom an email address could not be located. *Id.* at ¶¶16-19. After each mailing, the list of non-responsive attorneys was narrowed by removing attorneys whose addresses generated returned mailed with no forwarding information, and by removing attorneys who provided an explanation of their inability to complete the

Audit Survey. *Id.* at ¶20. The CAC's gripe that there is more that should be done is unfounded in the face of these extensive efforts. Moreover, the additional procedures proposed by the CAC would unduly burden the SF-DCT, which is operating with a reduced staff fully occupied with administrative tasks associated with its closing. *Id.* at ¶24.

Likewise, the CAC's assertion that the SF-DCT should be required to conduct individualized outreach to attorneys to provide them with SID numbers, claimant names, and other details would overburden the SF-DCT and is wholly unnecessary. Closing Order 4 explicitly provides any attorney with questions about the Audit Survey may call or email the Settlement Facility. ECF No. 1640, PageID.28796. It makes no sense to now shift this burden onto the SF-DCT.

III. THE CAC'S FEARS REGARDING THE SHOW CAUSE HEARING ARE UNFOUNDED AND IRRELEVANT

The CAC Response speculates that scores of attorneys who either never received Closing Order 4, are deceased, no longer practicing, or have destroyed old files will be unfairly held in contempt based on the FC Motion. The more likely outcome, if the FC Motion is granted, is that the vast majority of attorneys will complete the Audit Survey to resolve the matter and avoid appearing at the hearing, as permitted by the proposed order. Those who opt to appear at the hearing, will not automatically be held in contempt as the CAC insinuates. If the FC meets its burden of proof, any defending attorney will have the opportunity to demonstrate why he or

she should not be held in contempt. *See Wyatt ex rel. Rawlins v. Sawyer*, 80 F. Supp. 2d 1275, 1278 (M.D. Ala. 1999) (“[t]he defendant may... demonstrat[e] either that she has in fact complied with the court's order, that she was unable to comply, that she was otherwise excused from compliance, or that sanctions would be inappropriate despite her noncompliance.”). Similarly, the CAC cannot presume that attorneys will be held in contempt in absentia. Those decisions are for the Court. The CAC’s speculative fears are managed by the applicable proof and evidentiary requirements and do not present a valid basis to deny the FC Motion.

CONCLUSION

For the foregoing reasons, the Court should grant the FC Motion. Additionally, concerned that the closing process will continued to be delayed, the FC respectfully requests that the Court set a status conference to include the FC and the parties for purposes of clarifying the roles of the FC, the CAC, and Dow Silicones and the Debtor’s Representatives as they relate to the closing process.

Dated: April 25, 2023

Respectfully submitted,

/s Karima Maloney

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2023, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Dated: April 25, 2023

/s/ Karima Maloney

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