

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 RESPONSE TO OPPOSITION AND RESPONSES FROM THE CLAIMANTS’ ADVISORY COMMITTEE, THE PLAINTIFFS’ STEERING COMMITTEE AND DOW CORNING TO THE MDL 926 SETTLEMENT FUND’S MOTION FOR RESOLUTION OF 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 response to the Opposition and Response filings made by the Claimant’s Advisory Committee, the Plaintiffs’ Steering Committee and Dow Corning opposing MDL 926’s Motion for Resolution of Lien Claims Against Settlement Facility - Dow Corning Trust (“SF-DCT”), states as follows:

In an effort to aid this Court’s consideration of MDL 926’s response to the filings by the Claimant Advisory Committee (“CAC”), the Plaintiffs’ Steering Committee (“PSC”) and Dow Corning (“Dow”), the points made by each (including a reference to the location of the point being addressed) are set out hereinbelow in numerical format with MDL 926’s responses immediately following:

**CAC Response and Brief Points -**

(1) MDL 926 disregarded this Court’s June 18, 2007 Order, failing to address the sole issue of standing (CAC Response, I.1, p.2).

MDL 926 Response - The CAC is reading the “or” in Paragraph #3 of the Court’s June 18, 2007, Order as “and” (whether MDL 926 “has standing **or** any legal basis to assert a lien against Settling Claimants in the Dow Corning case” [emphasis added]). MDL 926’s Motion and Brief did

not specifically address standing; rather, they set forth arguments for MDL 926's equitable liens against funds due lien claimants from the SF-DCT, *i.e.*, MDL 926's "legal basis to assert a lien against Settling Claimants in the Dow Corning case."

(2) MDL 926 addressed (instead of standing), claimant specific lien issues which was expressly prohibited in the Order (CAC Response, I.1, p.2).

MDL 926 Response - Some general discussion of the categories of liens asserted by MDL 926 was necessary to illustrate the underlying argument regarding unjust enrichment and the necessity for an equitable lien. Information regarding each claimant's specific filings was given merely to show why said claimant was placed in one of the three categories. This information was also provided in response to the request of Ralph Knowles at the status conference that MDL 926's lien claims be described as specifically as possible to facilitate their resolution "sooner rather than later."

(3) MDL 926's motion for resolution is impermissibly and prematurely filed and allegations regarding individual claimant liens or their responses pursuant to the Lien Resolution Procedures should be disregarded (CAC Response, I.2, p.3).

MDL 926 Response - Explaining what the liens are is an integral part of substantiating the right to an equitable lien. The very nature of an equitable lien is heavily dependent upon the facts; thus, some exposition of the facts was necessary to aid this Court in determining whether equitable liens are appropriate.

(4) No Order entered authorizing Escrow Agent to take legal action against claimants on behalf of the MDL 926 Settlement Fund (CAC Response, I.3, p.3).

MDL 926 Response - With respect to the Escrow Agent's authority, the Escrow Agent may only make disbursements from the MDL 926 Settlement Fund according to the terms of the Escrow Agreement. Paragraph 4(d) of the Escrow Agreement limits the disbursements to those in accordance with Court Order or with Disbursement Schedules (claimant compensation payments). See **Exhibit A** attached hereto and incorporated herein by reference. If SF-DCT claimants are due payments from SF-DCT on claims previously paid by MDL 926, the MDL 926 Settlement Fund disbursements have not been made in accordance with the Disbursement Schedules and the Escrow Agent has a responsibility to attempt to retrieve those payments.

With respect to a Court Order, since at least June 3, 2005, at a status conference in New Orleans, Louisiana, the issue before this Court has been discussed by all parties with The Honorable U.W. Clemon, Chief Judge of the Northern District of Alabama (hereinafter sometimes referred to as the “MDL 926 Court”). As the CAC knows, Judge Clemon is fully aware of this issue and also fully cognizant that certain issues are to be decided by this Court and not by the MDL 926 Court. While the Escrow Agent has not specifically requested an Order from the MDL 926 Court, the Escrow Agent has kept said Court fully informed of his actions with respect to the MDL 926 liens against claimant funds from the SF-DCT, and the MDL 926 Court has been provided with copies of pleadings made by MDL 926 in this Court. The Escrow Agent has not been informed by the MDL 926 Court, to date, that his actions are either unauthorized or inappropriate.

If the Escrow Agent’s right and authority to bring the Motion is truly in question, it would also be appropriate to question the PSC’s and the CAC’s right to participate in this proceeding. The PSC was formed to direct the litigation with respect to breast implants in the MDL 926 Court, from which Dow withdrew by filing its Chapter 11 petition in bankruptcy, thereby coming under this Court’s jurisdiction, instead. The PSC therefore has no role in this proceeding. Likewise, the CAC does not administer the SF-DCT, nor is it authorized to represent individual claimants as it would do herein. See Section 4.09(c) of the Settlement Facility and Fund Distribution Agreement, effective date June 1, 2004.

The claimants and their counsel, who do have standing to challenge MDL 926’s liens (the “Lien Real Parties in Interest”), were notified of this proceeding directly by MDL 926, in accordance with the procedural Order of June 18, 2007. However, they filed no response; thus this Court may reasonably conclude that they thereby ratified those liens that they previously consented to and possibly those liens to which they did not timely object.

It is suggested that the Lien Real Parties in Interest, whose response was to be coordinated by the CAC under said procedural Order, be specifically invited instead to appear and express their position on the MDL 926 lien claims at the hearing on this matter. This will expedite resolution of this matter, with the PSC and CAC not being able to represent individual claimants, having no standing to proceed further herein, as explained above.

(5) The Order defining the terms under which Escrow Agent is to serve makes clear his duties are related solely to investment and custody of money in escrow account supervised by the Investment Committee and the MDL 926 Court (CAC Response, I.3, p.3).

MDL 926 response - The November 23, 1994 Order attached to the CAC Response and Brief approves the Escrow Agreement, appoints the Investment Committee and sets out the **Investment Committee's** responsibilities, not the Escrow Agent's responsibilities. The Escrow Agreement sets out the responsibilities of the Escrow Agent. See Exhibit A referenced in MDL 926 Response #4 hereinabove.

(6) Nothing to indicate the Investment Committee authorized the Escrow Agent to act and no Order directing the Escrow Agent or MDL 926 to pursue litigation against former claimants in a judicial district and forum not its own (CAC Response, I.3, p.3).

MDL 926 response - The Investment Committee, comprised of Don Springmeyer, Todd Poland and Ed Gentle, were consulted with respect to the Motion and Brief filed by MDL 926. They were submitted by e-mail to the Investment Committee for review and approval with the Investment Committee being allowed to participate in conference calls to finalize them for filing. See also MDL 926 Response to #5 hereinabove.

(7) The plain language of the operative document appears to preclude such independent action by the Escrow Agent (CAC Response, I.3, p.3).

MDL 926 response - The "operative document" (November 23, 1994 Order attached to the CAC Response and Brief) approves the Escrow Agreement, appoints the Investment Committee and sets out the **Investment Committee's** responsibilities, not the Escrow Agent's responsibilities. The Escrow Agreement sets out the responsibilities of the Escrow Agent. See Exhibit A referred to in MDL 926 Response #4 hereinabove.

(8) The MDL 926 Settlement Fund is not a trust such as in the Dow Corning case, but merely a bank account periodically funded as claims are approved by the defendants in the RSP (CAC Response, I.3, pp.3-4).

MDL 926 response - The MDL 926 Settlement Fund is an entity known as a qualified settlement fund under Section 468B of the Internal Revenue Code of 1986. See #26 hereinafter for further discussion of a Qualified Settlement Fund under Section 468B of the Internal Revenue Code

of 1986. MDL 926 currently employs over ten (10) people (and has employed many more in the past), operates a Claims Office in Houston, Texas, receives deposits from the RSP defendants, invests the monies within its QSF, makes settlement payments to its claimants, enters into real estate leases for the Claims Office facilities, purchases office furniture and equipment for the Claims Office and pays federal and state payroll taxes for its employees as some of the many functions MDL 926 undertakes. The MDL 926 Settlement Fund is much more than simply a bank account.

(9) MDL 926 Settlement Fund is not a separate legal entity empowered to take legal action on behalf of anyone, including RSP defendants, against very claimants the Fund was established to compensate. As such, the Escrow Agent has no standing or authority to act in dual and conflicting capacities - as alleged quality control arm of the neutral MDL 926 Claims Office and as a collection arm of the RSP defendants seeking to recover money on their behalf (CAC Response, I.3, p.4).

MDL 926 response - MDL 926 has the right to assert liens against SF-DCT payments to certain lien claimants, as recognized by SF-DCT in requesting lien filings from MDL 926 on 43 claimants and in paying 5 MDL 926 liens. The Escrow Agent is not acting in either capacity characterized by the CAC; he is merely attempting to carry out his responsibilities under the Escrow Agreement with respect to disbursements.

(10) The MDL 926 Settlement Fund has not sustained any loss capable of legal redress or recognition (CAC Response, I.3, p.4).

MDL 926 Response - MDL 926 is simply attempting to file liens on monies due SF-DCT claimants to prevent double-dipping. To the extent that claimants are allowed to double-dip, the compensation schedules of MDL 926 have not been complied with and the Fund has sustained a loss. This has been recognized by SF-DCT in its request for MDL 926 filing of liens and in its payment of MDL 926 liens.

(11) MDL 926 alleges that even though claimants in question should not be eligible to receive a payment from SF-DCT, SF-DCT should issue payment directly to MDL 926. No statutory, equitable or common law basis to support MDL 926's claim, nor does it provide any, that it or any other entity can intercept a right to payment directly from the SF-DCT, particularly if the claimant is not eligible for compensation in the first place (CAC Response, I.4, pp.4-5).

MDL 926 Response - This is a mis-characterization of MDL 926's claims. IF a claimant is due monies from SF-DCT (thus having an "Allowed Amount"), AND MDL 926 has a lien filed, then, to the extent of the lien, payment should be made to MDL 926 rather than to the claimant. If a claimant is not due monies from SF-DCT, then there will be no double payment to that claimant and MDL 926 has no lien. MDL 926 does not claim otherwise, contrary to the CAC's statements.

(12) In paragraph 5 of the CAC Response, the CAC argues that because SF-DCT is a separate entity and under the jurisdiction of a different Court, MDL 926 can have no claim against SF-DCT monies due a claimant (CAC Response, I.5., pp.5-6).

MDL 926 Response - If MDL 926's arguments regarding a single entity are successfully refuted (and the Court will make that decision), the mere fact that SF-DCT is a separate entity from MDL 926 does not automatically negate MDL 926's right to an equitable lien under the equitable principle of unjust enrichment.

(13) Dismay over derogatory tone and pejorative accusations made by MDL 926 ("double-dippers", "windfall", SF-DCT Administrator falsely accused of withholding documents, hiding or shielding "Allowed Amount" claims, violating the Court's Orders and claimants and attorneys accused of fraud and attorneys aiding and abetting claimants in alleged deception scheme) (CAC Response, I.6, pp.6-8).

MDL 926 Response - Thousands upon thousands of MDL 926 claimants filed claims which are not involved in the issue before this Court. A very, very, very small minority of claimants (either intentionally or unknowingly as set out in MDL 926's Brief) made a sworn statement to MDL 926 which is false. To the extent that the claimants (and their attorneys) did not know the statement was false at the time of making it, those claimants failed to correct their sworn statements and failed to refund that portion of monies not rightfully due them from MDL 926. To the extent that claimants intentionally withheld information from MDL 926 in their original claim and/or did not make diligent efforts to learn information that somehow, they learned in time to make a claim to Dow, those claimants submitted false sworn statements and/or failed to correct their sworn statements and failed to refund that portion of monies not rightfully due them from MDL 926.

With respect to SF-DCT, after December, 2005, SF-DCT did NOT follow the lien procedures set forth by this Court. Because it did not follow these procedures, it cannot complain about being called on it. Nor complain that other representations it makes may be viewed with question.

These statements are not derogatory or pejorative. They are statements of fact.

(14) Different provisions in the Dow Plan and the RSP allow more than 100% payment to claimants legitimately claiming under both MDL 926 and SF-DCT (SF-DCT 20% premium payment, saline-only RSP implants, RSP opt-outs, SF-DCT rupture payments (CAC Response, I.7, pp.9-10).

MDL 926 Response - The MDL 926 submissions to this Court made clear that they were talking about participants in the MDL 926 Settlement Fund (not opt-outs), and that there were some differences in the compensation schedules between the two plans. With respect to saline, MDL 926 did not deduct 50% for Dow saline-only implants (thus there is no difference with the Dow Plan). With respect to the 20% premium payment, it is MDL 926's understanding that this payment was promised under certain conditions, such as the number of persons participating in the settlement, the amount of settlement monies available, etc. and was by no means a guaranteed payment. MDL 926 is unaware whether the 20% premium payment conditions were met to allow its payment. These differences are not substantive enough to negate MDL 926's arguments respecting the two settlements and are certainly not dispositive of the issue of MDL 926's entitlement to equitable liens as set forth in its Motion.

(15) The Dow Plan is clear - if a claimant submits documents showing she is eligible and has an approved benefit, the claim must be paid regardless of payment amount from RSP or any other settlement (CAC Response, I.7, p.10).

MDL 926 Response - Such payments are to be made subject to liens under the lien procedures.

(16) There are 43 claimants whose claims have been consolidated for purposes of determining the standing issue, not 60 as alleged by MDL 926 (CAC Response, I.8(a), p.11).

MDL 926 Response - To the extent that MDL 926 has filed liens, the ruling by the Court should govern ALL such liens in order to have a consistent process. At the time of filing MDL 926's

Motion and Brief, there were more than 43 liens filed. Since the filing of MDL 926's Motion and Brief, the SF-DCT has requested MDL 926 file a lien on 3 more SF-DCT claimants.

(17) Forty-three claimants have an “Allowed Amount” without any finding of fraud by SF-DCT - allegations that they or their counsel defrauded SF-DCT are irrelevant to the issue of MDL 926's standing (CAC Response, I.8(b), p.11).

MDL 926 Response - Irrelevant to standing, but not to MDL 926's right to an equitable lien against monies due those 43 claimants. It is also interesting to note that SF-DCT previously determined an “Allowed Amount” for other SF-DCT claimants, and, after receiving the lien filing from MDL 926, rescinded the “Allowed Amount” designation and is investigating those claimants for fraud on the basis of documents they filed with MDL 926.

(18) MDL 926 liens are only thinly disguised attempts to take without proof or process Dow claimant payments in alleged satisfaction of unsupported general allegations that the release given to RSP defendants 10 years ago was flawed.(CAC Response, I.8(c), pp.11-12).

MDL 926 Response - No allegations have been made that the releases were flawed. MDL 926 is merely trying to enforce its requirements with respect to settlement compensation.

(19) Efforts to attach, garnish or sequester approved payments due Dow claimants funds from SF-DCT violate the principle that all funds in SF-DCT are *in custodia legis* and not subject to garnishment or attachment (CAC Response, I.8(d), p.12).

MDL 926 Response - MDL 926 is not attempting to attach, garnish or sequester funds in SF-DCT. It is attempting to comply with the lien procedures set forth by this Court (and require SF-DCT to comply as well) for monies approved to be paid to SF-DCT claimants who were paid 100% by MDL 926. If liens cannot be paid by SF-DCT on monies approved to be paid to SF-DCT claimants, why have lien procedures at all?

(20) MDL 926 inherently admits no statutory or consensual lien (CAC Response, I.8(e), p.12).

MDL 926 Response - Yes. MDL 926 is claiming an equitable lien, not a statutory lien and not a consensual lien in the sense that claimant signed a security agreement and lien form under the Uniform Commercial Code.

(21) Equitable liens are recognized only where claimants (i) have somehow absconded with the exact same asset which is the subject of the asserted equitable lien, (ii) arises in circumstances where the asserted lien holder is directly suing the defendant, and (iii) the asset subject to the asserted lien is tangible and capable of being impressed with the subject lien. (CAC Response, I.8(e), pp.12-13).

MDL 926 Response - This is not a correct statement of law according to *Bray v. Curtis*, 544 S.W.2d 816, 819 (Tex.Civ.App.-Corpus Christi 1976), writ refused n.r.e. (1977) (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”) or *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”). There are cases which cite the proposition set forth by the CAC. There are other cases which impose an equitable lien where these requirements are not met. Those cases are cited in MDL 926's Brief supporting its Motion.

(22) Illusory appeals to equity not supported by cognizable injury nor permissible under the law which interdict payments simply prolongs the delays suffered by these claimants. (CAC Response, I.8(e), p.13).

MDL 926 Response - Claimants who are suffering this delay are the claimants who made improper double claims. Without their intentional or erroneous filings, the issue would not have arisen.

(23) Neither Texas nor federal law will permit what is tantamount to an extraordinary prejudgment injunction, garnishment or attachment on this record (CAC Response, I.8(e), pp.13).

MDL 926 Response - MDL 926 has cited numerous Texas cases supporting its arguments with respect to equitable liens. If the reference to “federal” law has to do with the *in custodia legis* argument, see MDL 926 Response to #19 above.

(24) The Settlement Fund’s motion is defective as a threshold matter because it ignores the directive given to the parties by the Court in its Order of June 18, 2007: to address the common threshold issue of whether the MDL 926 Settlement Fund has standing or any legal basis to assert a lien against SF-DCT claimants (CAC Response, II.A.9, p.13).

MDL 926 Response - As stated in MDL 926's response to #1 above, the CAC is reading the "or" in Paragraph #3 of the Court's June 18, 2007, Order as "and" (whether MDL 926 "has standing **or** any legal basis to assert a lien against Settling Claimants in the Dow Corning case" [emphasis added]). MDL 926's Motion and Brief did not specifically address standing; rather, they set forth arguments for MDL 926's equitable liens against funds due lien claimants from the SF-DCT, *i.e.*, MDL 926's "legal basis to assert a lien against Settling Claimants in the Dow Corning case."

(25) MDL 926 engaged in a detailed discussion about the merits of individual liens it is asserting to drum up some alleged "equitable" basis for relief that is otherwise prohibited and all claimant specific references and allegations in the MDL 926 motion should be stricken and disregarded (CAC Response, II.A.9, pp. 13-14).

MDL 926 Response - As stated in MDL 926's responses to #2 and #3 above, some general discussion of the categories of liens asserted by MDL 926 was necessary to illustrate the underlying argument regarding unjust enrichment and the necessity for an equitable lien. Information regarding each claimant's specific filings was given merely to show why said claimant was placed in one of the three categories. Explaining what the liens are is an integral part of substantiating the right to an equitable lien. The very nature of an equitable lien is heavily dependent upon the facts; thus, some exposition of the facts was necessary to aid this Court in determining whether equitable liens are appropriate. Further, as set forth in the response to #2 above, specifics were included at the request of Ralph Knowles, a member of the PSC.

(26) In paragraphs 10-12, the CAC argues a number of interesting things, *e.g.*, (a) implying that MDL 926 never attained the status of a Qualified Settlement Fund ("QSF") under Section 468B of the Internal Revenue Code, (b) that MDL 926 is an escrow bank account, (c) that the Investment Committee did not authorize MDL 926's Motion and Settlement Class Counsel was not consulted, and (d) the RSP defendants are the true parties in interest, but have not made any complaints or asserted the releases given by the individual claimants.

MDL 926 Response - Although the CAC Response doesn't come right out and say that MDL 926 is not a QSF under the Internal Revenue Code of 1986 ("IRC"), it certainly implies it by stating in paragraph 10 of II.B. on page 14 of its Response, that a QSF "was intended to be formed [emphasis added] within the meaning of Section 468B of the Internal Revenue Code of 1986" and

that a letter ruling approving the QSF was never obtained. Section 468B of the Internal Revenue code of 1986 and the Regulations promulgated thereunder require establishment under an order, or approval, by a federal or state government or agency or instrumentality thereof, including a court of law to resolve one or more claims resulting from, among other things, a tort, and the fund's assets are segregated from other assets of the transferor(s) to the fund. See a copy of Section 486B of the Internal Revenue Code of 1986 and its pertinent Regulations attached hereto as **Exhibit B** and incorporated herein by reference.

The MDL 926 Settlement Fund was established (and approved by) an Order of the United States District Court in the Northern District of Alabama and continues under the jurisdiction thereof, was established to resolve and satisfy claims asserting liability arising out of a tort and its assets are otherwise segregated from the assets of the defendant transferors. Although it is possible to obtain a letter ruling from the Internal Revenue Service with respect to treatment as a qualified settlement fund, there is no requirement that a letter ruling be obtained before (or after) a QSF is established. Compliance with the requirements is sufficient.

From its inception, MDL 926 has filed federal income tax returns as a qualified settlement fund and the Internal Revenue Service has never questioned that status and has no reason to do so since the Settlement Fund fits squarely within the requirements for a qualified settlement fund.

Transfers to a Qualified Settlement Fund under Section 468B of the Internal Revenue Code of 1986, are entitled to be treated as deductions from income by the transferors. MDL 926 Settlement Fund assumes that all defendant transferors, including Dow Corning (who transferred \$42,500,000 to the MDL 926 Settlement Fund) claimed these deductions. MDL 926 has no information that any such deductions were disallowed by the Internal Revenue Service.

Despite the CAC's characterization of the MDL 926 Settlement Fund as merely an "escrow bank account" the MDL 926 Settlement Fund is an entity known as a qualified settlement fund under Section 468B of the IRC. MDL 926 currently employs over ten (10) people (and has employed many more in the past), operates a Claims Office in Houston, Texas, receives deposits from the RSP defendants, invests the monies within its QSF, makes settlement payments to its claimants, enters into real estate leases for the Claims Office facilities, purchases office furniture and equipment for the Claims Office and pays federal and state payroll taxes for its employees as some of the many

functions MDL 926 undertakes. The MDL 926 Settlement Fund is much more than simply an escrow bank account and the description of the settlement as a “claims made settlement” is irrelevant to the issues before the Court.

The Investment Committee, comprised of Don Springmeyer, Todd Poland and Ed Gentle, were consulted with respect to the Motion and Brief filed by MDL 926 prior to filing same with this Court. While there was no formal “vote” of the Investment Committee with respect to this filing, no Investment Committee member gave notice that he disagreed with the filing. As for consultation with Settlement Class Counsel, discussions were held with certain Settlement Class Counsel, including a conference call with this Honorable Court, in which it was clear that opposing views were held with respect to MDL 926 liens. Further “consultation” was not necessary.

The CAC response states that the “sole function of the escrow agent relates to the investment, custody and **oversight** of the funds paid into the escrow account” (paragraph 11, p.15). Oversight of these funds includes pursuing reimbursement of overpaid funds to claimants which the Escrow Agent is attempting to do through the liens filed with the SF-DCT.

The CAC’s claim that the “aggrieved party” is the RSP defendants, not the MDL 926 Settlement Fund ignores the responsibility of the Fund (and of the Escrow Agent pursuant to the Escrow Agreement) to properly manage and disburse the monies contained in the Fund. Upon learning that a few claimants were attempting to receive monies from the SF-DCT contradicting the sworn statements given to MDL 926 (and without having refunds overpaid monies to MDL 926), the Escrow Agent (and MDL 926) have a responsibility to attempt to retrieve monies overpaid to claimants. The Escrow Agent is required to disburse monies from the MDL 926 Settlement Fund only in accordance with the terms of the Escrow Agreement. The Escrow Agreement provides, with respect to claimants, that those disbursements be made in accordance with Disbursement Schedules (see paragraph 4(d) on page 9 of the Escrow Agreement provided to this Court as Exhibit A). Payments which were in excess of the Disbursement Schedules are the province of the Escrow Agent to attempt to remedy.

(27) The CAC is unaware of any order that authorizes the Escrow Agent, the Investment Committee with whom he is supposed to consult, or the RSP defendants to have access to individual claimant files (CAC Response, II.12 (footnote 11), p.16).

MDL 926 Response - As stated above, the Escrow Agent has a responsibility to remedy any overpayments made by MDL 926. To the extent necessary to prepare the liens filed with the SF-DCT, the Escrow Agent (and/or lawyers in his firm) have seen certain filings made by the lien claimants with the MDL 926 Claims Office. Such filings have not been shared with anyone else other than the information in the filings with this Court, which filings were painstakingly redacted in the service copies to refrain from including any confidential information. As also stated above, Judge Clemon, of the United States District Court for the Northern District of Alabama, has been informed throughout of the MDL 926's actions in this regard.

Furthermore, in order to determine that proper payment has been made, the Escrow Agent has, from the beginning of RSP payments, had access to all information used by the Claims Office to determine the amount of payment due each claimants. This information includes, without limitation, claimant names, Social Security numbers, addresses, implant manufacturer(s) (including whether a Dow implant), and the disease for which the claimant was approved. Even without the Escrow Agent's responsibility with respect to remedying overpayments, this information is necessary to allow the Escrow Agent to perform his duties.

(28) To the extent an issue of quality control or fraud is raised in the RSP, the MDL 926 Court has appointed a "Quality Assurance Committee" to address such matters (CAC Response, II.12 (footnote 11), p.16).

MDL 926 Response - The CAC's discussion of the Quality Assurance Committee is not relevant to the issues before this Court. That Committee was formed to assist the Claims Administrator in determining claimant fraud before claims were approved and payment was made by MDL 926, not with respect to the issues before the Court with respect to MDL 926's Motion. As discussed above, the Escrow Agent has a duty to attempt to remedy payments made in excess of payments allowed under the Escrow Agreement.

(29) No lien can be asserted against the funds that SF-DCT administers. The Funds of the SF-DCT are deemed *in custodia legis*. The terms of the Settlement Facility Agreement make plain that MDL 926 has no right to interdict approved settlement payments being made to Settling Claimants. The Dow Settlement Trust is expressly reserved for Settling Claimants and there are

plainly stated limitations upon any third parties to obtain relief. MDL 926 is not a claimant. There are no setoff rights for MDL 926 (CAC Response, II.C.13-15, pp.17-18).

MDL 926 Response - MDL 926 is not attempting to go against funds that are held generally by the SF-DCT; only against funds approved for payment to a specific lien claimant for which MDL 926 has filed a lien. If liens cannot be paid from the SF-DCT funds under any circumstances, why did this Court approve the Lien Procedures in its Order of June 18, 2005? Obviously, liens CAN be paid. MDL 926 is merely asserting its right to have its liens paid.

(30) Texas law requires (i) entry into consensual lien documents under the Texas Business & Commerce Code providing for the grant of a security interest in a contract right, or general intangible or (ii) imposition of a statutory lien in favor of a credit under, for example, the Texas Property Code. MDL 926 claims no consensual lien nor proffers a UCC-1 financing statement. It is self-evident that MDL 926 relying solely on general principles of equity to support attaching an interest in funds payable from SF-DCT to the Settling Claimant (CAC Response, II.D.16, p.19).

MDL 926 Response - Yes, MDL 926 is asserting only an equitable lien with respect to its right to SF-DCT funds due claimants as set forth in its Brief.

(31) MDL 926 has only judicial relief on an unsecured claim; thus its claims for relief are solely available through issuance of a prejudgment writ in an action initiated against a claimant seeking imposition of some form of unstated injunction, prejudgment garnishment, sequestration or attachment of a Settling Claimant's property rights under applicable state law. MDL 926 is seeking a form of prejudgment asset freeze on the Settling Claimants distribution from the SF-DCT. Such relief is only available in extraordinary circumstances not applicable here and requires specific evidentiary proof (which is clearly missing in the MDL 926 Motion) and posting of a bond (CAC Response, II.E.17, p.20).

MDL 926 Response - As stated previously, MDL 926 is seeking imposition of an equitable lien in these circumstances, which are extraordinary. It is not seeking imposition of an injunction, prejudgment garnishment, sequestration or attachment as alleged by the CAC. It merely seeks to have its liens recognized and the lien procedures set forth by this Court followed by the SF-DCT. As for evidentiary proof "clearly missing from its Motion," didn't the CAC complain of the limited characterization of the claimant liens used by MDL 926 in its submission to this Court?

(32) The CAC argues, in its Brief supporting its Response that MDL 926's Motion ignores this Court's direction and should be therefore be stricken (CAC Brief, II.A.2-3, pp.2-3).

MDL 926 Response - As previously stated, the CAC is reading the "or" in Paragraph #3 of the Court's June 18, 2007, Order as "and" (whether MDL 926 "has standing **or** any legal basis to assert a lien against Settling Claimants in the Dow Corning case" [emphasis added]). MDL 926's Motion and Brief did not specifically address standing; rather, they set forth arguments for MDL 926's equitable liens against funds due lien claimants from the SF-DCT, *i.e.*, MDL 926's "legal basis to assert a lien against Settling Claimants in the Dow Corning case." As such MDL 926's Motion and Brief were responsive to this Court's direction and are not due to be stricken.

(33) The CAC sets forth case law on standing as relates to federal court jurisdiction and the requirements thereof in support of its argument that MDL 926 has no standing before this Court (CAC Brief, II.B.4-7), pp.3-5).

MDL 926 Response - The CAC attempts to characterize the issue before this Court as a new case in which standing must be proven before a federal court has jurisdiction. MDL 926 does not rebut the CAC's assertions as to the threshold requirements of standing to prove jurisdiction. They are, however, not relevant to the issues at hand. The issue before this Court is not a new action in which jurisdiction must be determined. The Court HAS jurisdiction already with respect to SF-DCT payments to its claimants. The Court has established lien procedures with respect to claims made by third parties against those payments. MDL 926 is merely making claims under those lien procedures in a case in which this Court already has jurisdiction.

(34) No lien can be asserted against the funds that the SF-DCT administers (CAC Brief, II.C.8, p.5-6).

MDL 926 Response - If this statement is true, the parties would not have agreed to and this Court would not have approved the Lien Procedures in its Order entered June 30, 2005.

(35) The fund administered by the SF-DCT is expressly reserved for Settling Claimants, and there are plainly stated limitations upon any third parties to obtain relief even if recognized creditors, which MDL 926 is not (CAC Brief, II.C.9, p.6).

MDL 926 Response - Liens were clearly provided for as evidenced by the Lien Procedures approved by this Court in its Order entered June 30, 2005.

(36) SF-DCT is not subject to equitable liens or other *quasi* prejudgment garnishment writs under the Joint Plan (CAC Brief, II.C.9, p.7).

MDL 926 Response - Equitable liens are imposed by a Court of equity and it falls within this Court's purview to determine whether MDL 926 has equitable liens against SF-DCT funds due claimants against which MDL 926 has filed liens.

(37) MDL 926 is not entitled to a set-off. There is no required mutuality between what the Settlement Fund is erroneously claiming for the benefit solely of the absent RSP Defendants against the Settling Claimants, on the one hand, and what the Settling Claimants are due on Allowed Claims from SF-DCT on the other. An otherwise unproven appeal to equity cannot override what the law provides or requires (CAC Brief, II.C.10, pp.7-8).

MDL 926 Response - As previously stated, this Court has the authority to impose an equitable lien in favor of MDL 926 with respect to funds due an SF-DCT claimant which will represent a double payment to said claimant. In its Motion and Brief, MDL 926 has set forth the grounds and the authority for such an equitable lien.

(38) Appeals to equity by MDL 926 do not give rise to any valid or recognizable lien and Texas law only grants lien rights when consensual lien documents under the Texas Business & Commerce Code are entered into or when a statutory lien is given (CAC Brief, II.D.11, p.8).

MDL 926 Response - As set forth in MDL 926's Brief, Texas law does recognize liens other than under the Texas Business & Commerce Code or other statute. Texas law recognizes equitable liens and the CAC has cited no authorities overruling the case law supporting MDL 926's position.

(39) Without a consensual or statutory lien right, MDL 926 has only issuance of a prejudgment writ in conjunction with a required direct formal action initiated by a proper party which also seeks prejudgment garnishment, sequestration or attachment of a Settling Claimant's property rights under applicable state law (CAC Brief, II.E.12, p.9).

MDL 926 Response - The CAC continues to ignore Texas case law cited in MDL 926's Brief with respect to equitable liens, although citing no authorities overruling such case law.

(40) MDL 926 is actually seeking a form of prejudgment asset freeze on the Settling Claimants distribution from the SF-DCT. The SF-DCT is not subject to such attachment claims and

MDL 926 has failed to satisfy the requirements of the Federal Rules of Civil Procedure with respect to an asset freeze (CAC Brief, II.E(a).13, p.9).

MDL 926 Response - MDL 926 is not seeking a prejudgment asset freeze. MDL 926 is seeking the imposition of an equitable lien on the monies due a small number of SF-DCT claimants pursuant to liens filed with the SF-DCT under the Lien Procedures approved by this Honorable Court.

(41) An alleged overpayment made 10 years ago by RSP Defendants is not traceable to SF-DCT funds now due a Settling Claimant under a completely different settlement program. A payment made 10 years ago by RSP Defendants was unrelated to a SF-DCT payment to settle a claim against Dow Corning. These are different settlements, involving payments on implants made by different manufacturers (CAC Brief, II.E(a).14, p.10).

MDL 926 Response - MDL 926 has set out its reasoning for the tie between the two settlements in its Motion and Brief previously filed with this Court and won't repeat them here. However, it may be instructive to this Court that the SF-DCT has re-classified the status of certain of its' Settling Claimants claims due to liens filed against monies due said Settling Claimants by MDL 926. MDL 926 was invited by the SF-DCT to file a lien against certain Settling Claimants, which, under the Lien Procedures, meant that an Allowed Amount had been determined for such Settling Claimants. After MDL 926's liens were filed, certain of those Settling Claimants have had their Allowed Amount rescinded and are now under fraud investigation by the SF-DCT. Obviously, the payments made by MDL 926 are **not** unrelated to SF-DCT payments to settle claims against Dow.

(42) The claimants from MDL 926 who received payment in exchange for release of the RSP Defendants dealt at arms length with MDL 926, tendering documents which under the terms of that settlement were reviewed and approved as part of closing that distinct settlement. There is no reason to believe that the payments made were subject to any sort of limitation or trust character, and MDL 926 certainly cannot establish any nexus to the payment made in that case toward establishing any inherent equitable lien right on the wholly separate payment to be made under the Joint Plan (CAC Brief, II.E(a).15, p.11).

MDL 926 Response - The CAC consistently ignores the sworn statement required to be signed by each claimant stating that the information given to MDL 926 in support of the claim is true. Claimants who apparently deliberately falsified their MDL 926 proof of claim in order to receive 100% benefits from MDL should not be allowed to profit from their falsification. Claimants who were unaware of the true facts at the time of their proof of claim filing with MDL 926, but who discovered the true facts later, have an obligation to correct their statements made under penalties of perjury.

(43) The SF-DCT did not find any evidence of fraud under such baseline facts and there is no reason to think that the payment by SF-DCT to the qualifying Settling Claimant should be interdicted (CAC Brief, II.E(a).15, p.11).

MDL 926 Response - The SF-DCT is investigating fraud for some of the claimants against whom MDL 926 has filed liens based on MDL 926 documents (which liens were originally filed only at the invitation of the SF-DCT after an Allowed Amount was determined for such claimants).

44) The CAC cites numerous cases in support of its arguments and attempts to discredit the cases cited by MDL 926 (CAC Brief, II.E(a).16-19, II.E(b).20-21) and II.F.22-26, pp.11-19).

MDL 926 Response - Since no one has cited any cases with facts on point, it seems doubtful that there are any such cases. Thus, all cases cited in opposition to MDL 926's arguments could be distinguished on some factual point, as could all of MDL 926's cases cited in support of its arguments. There is authority to allow this Court to impose an equitable lien in favor of MDL 926 as requested in its Motion and there are cases which seem to be in opposition. It is up to this Court to determine what is equitable.

**PSC Opposition Point** -

(45) The PSC's Opposition argues that a lien, under Texas law, requires some agreement or act giving one creditor superior rights to collateral over other unsecured creditors. To our argument that a contract was entered into based on the RSP Notice and the claimant's execution of a Proof of Claim, the PSC points out that this still only creates an underlying debt; it does not create an agreement that specific property of the debtor will secure payment of the debt.

MDL 926 Response - The claimants against whose SF-DCT funds an MDL 926 lien is sought to be imposed falsified either intentionally or erroneously their proof of claim given under

penalty of perjury<sup>1</sup> and did not correct that statement or refund their payment wrongfully obtained. The equities of the situation allow the Court the latitude to impose an equitable lien in favor of MDL 926 under the authorities cited in our Brief without the prior identification of specific property to secure the payment of the debt. MDL 926 is not just another creditor in this situation. The peculiar and extraordinary facts present here mandate against that.

The claimants against whom MDL 926 has asserted liens are not claimants who have innocent hands. If they did initially, they do not now (other than those claimants who have consented to MDL's liens, but SF-DCT has not honored such consent).

**Dow Response Points -**

(46) Dow's emphasis (not otherwise already addressed here) is that the Plan approved by the Bankruptcy Court cannot be modified.

MDL 926 Response - MDL 926 is NOT seeking to modify the Plan. MDL 926 is not seeking to attach or get to any monies in the Plan other than payments approved to be made to SF-DCT claimants against whom MDL 926 has filed liens. The Court has established lien procedures; therefore, there is a recognition that some monies due the claimants can be paid to someone other than the claimants.

In addition to the specific responses made herein to the CAC, PSC and Dow responses and opposition to MDL 926's Motion for determination of its right to equitable liens, MDL 926 requests this Honorable Court to take note that claimants AND the SF-DCT have already recognized MDL 926's right to file a lien against the Allowed Amount determined by the SF-DCT for claimants MDL 926 determines are double dippers. Although none of the responses/opposition reference these facts, the SF-DCT has actually paid 5 of MDL 926's liens for double-dipping claimants and the SF-DCT continues to request lien filings from MDL 926 for such instances. Similarly, none of the

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<sup>1</sup>Paragraph 30(b) of the RSP Revised Notice states: The Claims Office will continue to implement procedures designed to detect and prevent payment of fraudulent claims. To deter potential fraud, all claims must be signed under penalties of perjury. Since the Postal Service will be used in the processing and payment of claims, submission of fraudulent claims will violate the criminal laws of the United States and subject those responsible to criminal prosecution in the federal courts.

responses/opposition deal with the fact that claimants and/or counsel for claimants have, in 3 other instances known to MDL 926, consented to MDL 926's liens. The CAC, PSC or Dow should not have any standing to object to MDL 926 liens to which claimants and/or their counsel have previously consented.

Respectfully submitted this the 31st day of August, 2007.

ALLARD & FISH, P.C.

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