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**

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE IN OPPOSITION TO MOTION OF DOW CORNING CORPORATION AND DEBTOR'S REPRESENTATIVES TO STAY THE COURT'S RULING GRANTING THE FINANCE COMMITTEE'S MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS PENDING APPEAL

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STATEMENT OF ISSUE PRESENTED

Whether this Court should stay its Order adopting the Finance Committee's conservative recommendation to authorize completion of 50 percent Premium Payments and to issue 50 percent of other allowed Second Priority Payments where: Movants have demonstrated neither their likelihood of success on appeal nor any serious issues for consideration by the Sixth Circuit; Movants will suffer no harm absent a stay; further delay will cause significant injury to sick and dying claimants; and the public interest favors enforcement of the bargain Dow Corning made with claimants nearly 20 years ago and avoidance of further delay that may erode confidence in the settlement and the judicial system.

STATEMENT OF CONTROLLING AUTHORITY

Fed. R. Civ. P. 62(c)

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir. 1991).

In re Settlement Facility Dow Corning Trust, 592 F. App'x 473 (6th Cir 2015).

PRELIMINARY STATEMENT

The Claimants' Advisory Committee ("CAC") respectfully submits this response to Movants' motion to stay, pending appeal to the Sixth Circuit, this Court's December 27, 2017 Memorandum Opinion and Order (the "Order") authorizing the distribution of remaining 50 percent installments on long-overdue Premium Payments, as first recommended by the Finance Committee in 2011, as well as 50 percent installments on other categories of allowed Second Priority Payments.[1]

As this Court knows, Dow Corning promised breast implant claimants nearly 20 years ago that, if sufficient funding existed, the SF-DCT would make Premium Payments (or "Premiums") to all settling claimants with approved and paid disease and rupture claims. Sections 7.01 and 7.03 of the SFA charge the Finance Committee to assist the Court in determining the existence of sufficient funds by making recommendations based on projections prepared by the Independent Assessor ("IA") derived from its analysis of past claim approval and payment history. In 2011, upon concluding that adequate funding existed to cover all future First Priority Payments as well as at least 50 percent of accrued and future Premium Payments, the Finance Committee asked the Court to authorize

[1] Terms are abbreviated herein as they are in Dow Corning Corporation's and The Debtor's Representatives' Memorandum of Law in Support of Motion to Stay the Court's Ruling Granting the Finance Committee's Motion For Authorization to Make Second Priority Payments Pending Appeal ("Movants' Br.").

partial Premium Payments "as soon as possible, so that the administrative process can be completed in time to make Premium Payments beginning in 2012." Docket No. 814 (Finance Committee's First Amended Recommendation and Motion) at 15. Since that time:

- The Court authorized 50 percent Premiums in 2013, and the majority of those claims were paid;
- the Sixth Circuit reversed in 2015, clarifying a higher "virtual guarantee" standard of funding certainty to be applied on remand;
- the Finance Committee, based on five additional years of experience confirming a massive and growing funding cushion, in 2016 conservatively recommended authorization to finish the 50 percent Premium Payments halted by the Sixth Circuit ruling, as well as 50 percent of other Second Priority Payments; and
- following briefing, submission of expert opinions, and a hearing, the Court endorsed that recommendation in the December 2017 Order, based on its finding of adequate funding to a "virtual guarantee."

Now, in 2018, less than 16 months from the end of the settlement program, Dow Corning seeks yet *more* delay – a stay effectively nullifying the Order and requiring remaining unpaid claimants to wait until the end of the program to receive even a fraction of what they were told would likely be paid just a few years after the Effective Date. Enough is enough.

Misapplying the familiar four-part balancing test, Movants fail to make a valid showing on *any* of the factors:

First, Movants do not articulate serious issues presented by their appeal – much less any clear errors of law or clearly erroneous factual findings that

could conceivably support a *likelihood* of reversal. Unlike the prior appeal, this one involves no significant questions of law but merely the Court's assessment of facts based on the Sixth Circuit's clarified standard. The Order represents a conservative, intermediate step to provide additional claimants with *half* of the Premiums meant to be paid long ago – amounts already paid to most claimants with no negative impact on the settlement's solvency. Dow Corning does not even attempt to articulate a reasonably conceivable scenario in which unexpected changes in claiming patterns in the final months of the settlement could consume a cash cushion of more than $300 million.

Second, Movants do not establish *any* meaningful impact on Dow Corning absent a stay, much less irreparable harm. Movants misleadingly liken Premium Payments to monies that, absent a stay, could be irretrievably disbursed to payees ultimately determined to be ineligible. But here, the entitlement of disease and rupture claimants to the Premium Payments is already fixed, subject only to available funding, and the majority of claimants have already received their 50 percent Premiums, creating horizontal inequity among similarly situated claimants. Accordingly, even if the Order were ultimately reversed, that would affect only the potential *timing* of the remaining payments – which would have a negligible impact on the time value of funds in the Trust and no immediate impact on Dow Corning, because the Trust has a sufficient remaining balance to cover all

payments likely to be issued during the pendency of this appeal. Conceivably, distribution of Premium Payments could affect the timing of *future* payments that Dow Corning may have to make after the current fund balance is consumed, but such "harm" is entirely speculative and remote, and Movants do not even attempt to establish it in their papers. Instead, Movants try to assume the mantle of protector of the tort claimants, arguing that absent a stay funds could be dissipated that might be needed to cover the last few First Priority Payments. But this argument fails for the same reason as the showing of likelihood of success on appeal: The record overwhelmingly establishes that the risk of the cap being exceeded at this point is so far-fetched as to be virtually impossible.

In contrast, a stay would inflict immediate and irreparable harm on each and every eligible claimant who has not yet received a 50 percent Premium. Dow Corning's expert testified at the confirmation hearing that Premiums would be paid in the seventh year of the fifteen-year settlement program, but the *fourteenth* anniversary of the Effective Date is less than four months away. Claimants receive no cost-of-living adjustments on any of their payments, so every day, month, and year of delay translates to money they will never see. And, as the Court is aware, the claimant population is aging, and, with the passage of time, claimants are dying or otherwise falling out of touch with the SF-DCT. All of this thwarts the ability of claimants to realize the benefit of the bargain they struck at

Dow Corning's urging in 1999. Indeed, "[t]he fact that claimants have been dying for some time in no way undermines the very real harm they continue to suffer. . . . [J]ustice deferred may well be justice denied." *W.R. Grace & Co. v. Libby Claimants (In re W.R. Grace & Co.)*, No. 01-1139, 2008 WL 5978951, at *8 (D. Del. Oct. 28, 2008), *aff'd*, 591 F.3d 164 (3d Cir. 2009).

Finally, delay not only causes immediate and irreparable harm to claimants – it threatens to further undermine confidence in the settlement and the judicial system, which has been strained by the marked delays in implementing many aspects of the Dow Corning Plan. As a result, the public interest would be disserved if Movants succeeded in continuing to deprive claimants of their already-earned Premium Payments, effectively delaying all such payments to the fast-approaching end of the settlement program.

Fairness, equity, and the balance of hardships thus counsel against a stay pending appeal.

ARGUMENT

To obtain a stay pending appeal under Fed. R. App. P. 8(a),[2] Movants must carry the burden of demonstrating that four "interrelated considerations" balance in their favor: (1) their likelihood of success on appeal; (2) the likelihood

[2] As Movants note (Movants' Br. at 8), the factors regulating the issuance of a stay by a court of appeals under Fed. R. App. P. 8(a) are the same as those that apply in this Court pursuant to Fed. R. Civ. P. 62(c). *See generally Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

that they will suffer irreparable harm absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest. *See Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). The decision whether to grant a stay is entrusted to the Court's sound discretion. *See Green Party of Tenn. v. Hargett*, 493 F. App'x 686, 689 (6th Cir. 2012) ("The issuance of a stay pending appeal 'is not a matter of right,' but 'an exercise of judicial discretion.'" (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009))).[3]

Though the factors to be considered here are the same as those the Court would evaluate upon a motion for a preliminary injunction, *see Griepentrog*, 945 F.2d at 153, Movants must meet a "higher burden" because their motion has been made "after significant factual development and after the court has fully considered the merits." *United States v. Omega Solutions, LLC*, 889 F. Supp. 2d

[3] Movants suggest that they are entitled to a stay as of right under Fed. R. Civ. P. 62(d), a rule that Movants concede applies only to money judgments. *See* Movants' Br. at 19 (citing *Arban v. W. Publ'g Corp.*, 345 F.3d 390, 409 (6th Cir. 2003)). However, this Court's Order, which simply makes findings about funding adequacy in the context of implementing a global settlement and does not direct Movants to pay anything, is not a money judgment. *See, e.g.*, *Peacock v. Merrill*, No. 05-00377-KD-C, 2010 WL 2231896, at *1 (S.D. Ala. June 2, 2010) (judgment determining party's "right to funds" without requiring payment of money by either plaintiff or defendants was not a money judgment that could be stayed upon posting a bond). Apparently recognizing that Rule 62(d) is inapposite, Movants focus on analyzing the *Griepentrog* factors. Accordingly, in this Response, the CAC does the same.

945, 948 (E.D. Mich. 2012); *see also Bailey v. Callaghan*, No. 12-CV-11504, 2012 WL 3134338, at *1 (E.D. Mich. Aug. 1, 2012) (Hood, J.). Accordingly, the Sixth Circuit has instructed that a party seeking a stay pending appeal must demonstrate "a likelihood of reversal." *Bailey*, 2012 WL 3134338, at *1 (quoting *Griepentrog*, 945 F.2d at 153). Movants fall far short of that requirement.

THE COURT'S ORDER SHOULD NOT BE STAYED

Each of the *Griepentrog* factors weighs strongly against a stay. First, Movants fail to show any probability of success on the merits. Second, Movants identify no plausible, let alone irreparable, injury that would be visited upon them either pending appeal or following an unlikely reversal. Third, Movants give no weight to the significant harm a stay would cause claimants. Last, Movants ignore the public interest that is served by requiring Dow Corning to honor the court-approved settlement it has endeavored to obstruct at every turn since the 2004 Effective Date.

A. The Appeal Has No Likelihood of Success on the Merits, and Movants Fail to Seriously Argue Otherwise

Shying away from their considerable burden, Movants argue that, in lieu of a likelihood of success, they need demonstrate only "serious questions on the merits" of their appeal. Movants' Br. at 13. But that standard applies only where "a movant demonstrates irreparable harm that decidedly outweighs any potential harm" to other parties. *Griepentrog*, 945 F.2d at 153-54. Because, as

discussed below, Movants cannot demonstrate the likelihood of *any* significant injury, their showing on the merits must be far stronger. As the Sixth Circuit has explained: "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the Movants] will suffer absent the stay." *Id.* at 153.

In any event, Movants do not identify even a single serious issue for appeal. Unlike the prior appeal, which presented several contested legal questions involving construction of the Dow Corning Plan that were decided in *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473 (6th Cir 2015), this appeal concerns only the straightforward application of the Sixth Circuit's heightened "virtual guarantee" standard to the current *facts* before the Court.[4]

On the bottom line question of whether the Court clearly erred in finding that there was a virtual guarantee of sufficient funding, Dow Corning offers no scenario, much less a plausible one, under which the IA's projections could be off by *$300 million* (the cash equivalent of the projected $100.4 million NPV cushion) in the short time remaining in this settlement. It may not be

[4] Thus, the fact of prior reversal does not support a likelihood of success now, distinguishing this case from *Edwards v. First Am. Corp.*, No. CV 07-03796 SJO (FFMX), 2013 WL 12213848 (C.D. Cal. Apr. 9, 2013) (*see* Movants' Br. at 18). There, the court found that appellants had a likelihood of success in challenging a novel class certification ruling where the Ninth Circuit had already granted review under Fed. R. Civ. P. 23(f) in addition to having reversed multiple earlier rulings in the matter. 2013 WL 12213848, at *3.

mathematically impossible for that to happen, but it is as close to that as can be without simply waiting until the end of the settlement – which would eliminate all uncertainty, but violate the agreement embodied in the Plan to pay Premiums *before* all uncertainty could be eliminated. *See In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480 (virtual guarantee standard "does not require absolute certainty"); *id.* at 479 ("Because it is impossible to account for all possible future uncertainties, we will not impose an 'absolute guarantee' standard of confidence, as that would make SFA § 7.03(a) [providing for approval of Second Priority Payments based on claim projections] superfluous.").

This Court appropriately based its approval of the Finance Committee's recommendation on the IA's projections, as required by the Plan. The Court noted that the IA used conventional, widely accepted statistical techniques embodying conservative assumptions and with an impressive track record of accuracy over the course of the settlement program (Order at 24-25, 27) and that Dow Corning did not present any alternative methodology or data that would materially alter the projections (*id.* at 26). The Court took account of Dow Corning's arguments about the possibility that an unexpectedly high number of remaining claimants might surface with last-minute claims, but noted a series of factors – including the dramatic slowing of claims in recent years despite repeated notices to claimants; the experience of the MDL-926 Revised Settlement Program;

and the absence of any evidence suggesting that the slowdown of claims "will somehow dramatically reverse course" – supporting the IA's finding that sufficient funding was virtually guaranteed. *Id.* at 27. The Court ultimately agreed with the IA's conclusion, stressing that, while every individual element of the projections cannot be guaranteed, the "ultimate projection" of a virtual guarantee was supported by the IA's conservative assumptions and the huge margin for error reflected in the $100.4 million NPV cushion. *Id.* at 27-28.

Not only is this factual conclusion not "clearly erroneous" – it is clearly correct. None of Movants' supposed appeal issues presents a serious question, much less a likelihood of reversal.

First, Movants argue that the "virtual guarantee" standard requires "quantification" of the degree of risk that the cap will be exceeded, based on cases discussing similar language in other contexts. Movants' Br. at 13-14. But the Sixth Circuit did *not* require quantification of the risk. It merely observed that "[w]hile [the virtual guarantee] standard does not require absolute certainty, it is nonetheless stricter than the 'strong likelihood' or 'more probable than not' levels of confidence that describe 'adequate assurance.'" *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480. Movants cite no authority at all, much less any from a remotely analogous context, requiring "quantification" of risk in projecting funding adequacy. The Court did not err in simply assessing the record

using the Sixth Circuit's own language of "virtual guarantee," in essence applying a standard requiring near but not absolute certainty.

Second, Movants rehash their repeatedly rejected assertions that the IA's methodology is inherently uncertain and based on too many assumptions. Movants' Br. at 14-15. However, as both this Court and the Sixth Circuit have held, the Plan *requires* that the decision to approve Second Priority Payments be based on the methodology of projecting future claims based on past experience. *See In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480-81 (district court correctly held that it "must make its decision to authorize Second Priority Payments '*based* on the Independent Assessor's analysis and projections'"); *id.* at 478 ("The parties agree that the district court must rely on projections of the availability of funds, including the cost of making future First Priority and Litigation Payments, . . . to determine whether making Second Priority Payments would jeopardize future First Priority and Litigation Payments."). Dow Corning has never identified a different methodology that would allow the IA to make such projections, much less one that could eliminate all "assumptions."

Third, Movants argue that it was "impermissible" for the Court to cite a chart introduced by Dow Corning's expert at the Confirmation Hearing to support a supposedly "watered down standard." Movants' Br. at 15, 17. But the Court did no such thing; it merely noted that (1) the Plan was confirmed based on

projections from Dow Corning's own expert, Dr. Frederick Dunbar, showing that "more than $150 million in 100% Premium Payments could be issued in year eight" and (2) the settlement is "now further out than Dr. Dunbar's projections and now there is less risk to the base payments than Dr. Dunbar presented before the bankruptcy court." Order at 25-26. The Court did not offer these observations to "water down" the Sixth Circuit's virtual guarantee standard, but to refute Dow Corning's argument that it would be consistent with the parties' expectations and intent to delay Premium Payments "until the end of the settlement when all uncertainty is eliminated," an argument that "essentially transforms the standard from 'virtual' to 'actual' certainty." *Id.* at 24.

Fourth, Movants argue that the Court erred in "shifting the burden to Dow Corning to demonstrate that the virtual guarantee standard is not met." Movants' Br. at 18 n.9. Movants do not identify any discussion of burden of proof in the Order, merely citing generally to the pages (24-27) in which the Court discusses and rejects Dow Corning's criticisms of the IA Report and other arguments. This discussion does not shift the burden of proof to Dow Corning. Rather, the Court examines all the evidence and arguments before independently concluding, as required by the Plan, that "there is adequate provision or a 'virtual guarantee' that Allowed and Allowable First Priority Claims will be paid based on

the available assets even with the distribution of the 50% of the Second Priority Payments." Order at 28.

Finally, Movants remarkably allege that "changed circumstances" render the 2016 IA Report "incomplete" because the Settlement Facility will be approving a notice plan regarding the 2019 final claim deadline, and that such notice "may change filing behavior" and "likely would change the outcome" of claims filing. Movant Br. at 18. Movants further argue that the IA has "warned that efforts to contact claimants will likely alter the claim filing behavior and thus alter the outcomes of the calculations on which this Court relied." *Id.* at 7. However, additional notices to claimants regarding conclusion of the settlement program have long been anticipated, and a claims "bump" based on the final deadline long built into the IA's assumptions and projections. Standard disclaimer language, and the expectation of some variations in claim flow as a result of such outreach, do not equate to a material risk of an explosion of claims large enough to threaten the funding cap. There is literally nothing in the record supporting – and much contradicting – the suggestion that a final claim surge based on notice mailings could come remotely near to consuming the immense cash cushion existing under the IA's projections. Dow Corning's statements that such a material risk exists are sheer speculation entitled to no weight on this motion or on appeal.

Indeed, if the Court is inclined to go outside the record in assessing the likelihood of reversal based on the reliability of the IA's projections, we note that there is available an entire additional year of data, embodied in the IA's Final Report dated December 15, 2017, showing no material change in claim filing and an even larger cushion, with one fewer year of future risk remaining. *See* Ex. A at 18 (based on claims data through June 2017, projecting $103.8 million NPV cushion after making 50 percent Second Priority Payments).

In short, Movants identify no serious issue on appeal, much less one suggesting a likelihood of reversal. Despite their attempt to frame their arguments in terms of legal error, Movants are ultimately arguing that the Court's *factual* conclusion was clearly erroneous – which undermines any showing of likelihood of success. *See, e.g.*, *Avendano v. Smith*, No. CIV 11-0556 JB/CG, 2011 WL 5223041, at *14 (D.N.M. Oct. 6, 2011) ("deferential standard of review" of fact finding reduces "likelihood of success on the merits of this issue on appeal"); *Dayco Corp. v. Foreign Transactions Corp.*, No. 82 Civ. 3354 (MJL), 1982 U.S. Dist. LEXIS 10094, at *4 (S.D.N.Y. Oct. 14, 1982) (denying stay application and holding that plaintiff failed to show likelihood of success where "case turned primarily on a factual determination . . . entitled to greater deference than would be a purely legal finding"); *In re Pub. Serv. Co. of N.H.*, 116 B.R. 347, 349 (Bankr. D.N.H. 1990) (court "cannot find movant has such a strong case [of likelihood of

success] because most of the appeal involves factual issues which are subject to the 'clearly erroneous' standard of review"). Merely "labeling" a fact issue as a legal issue "does not make it so and does not change the standard of appellate review." *Doctors Hosp., Inc. v. Desnick (In re Doctors Hosp., Inc.)*, 376 B.R. 242, 247 (Bankr. N.D. Ill. 2007) (deferential review of factual findings "heighten[s] the burden Defendant has to overcome to prove likelihood of success").

B. Movants Would Suffer No Irreparable Harm Absent a Stay

In evaluating whether a party will suffer irreparable harm in the absence of a stay, courts in the Sixth Circuit generally look to three factors: "1) the substantiality of the injury alleged; 2) the likelihood of its occurrence; and 3) the adequacy of the proof provided." *Griepentrog*, 945 F.2d at 154 (citation omitted). Movants fail to meet the requisite standard as to any of those factors.[5]

Movants' only concrete allegation of irreparable harm is that, if they prevail on appeal, it will be impossible to "recoup the funds once distributed to thousands of individuals." Movants' Br. at 9. This argument relies on the false premise that reversal of the Court's Order is tantamount to determining that claimants are not entitled to Premium Payments. *See id.* (quoting *In re Diet Drugs*

[5] Movants fail at the outset to offer "specific facts and affidavits supporting assertions that these factors exist." *Griepentrog*, 945 F.2d at 154. Here, no specific facts or affidavits have been offered, and Movants' factual showing in support of a stay is utterly conclusory. The complete lack of detail and substantiation is itself grounds for denying the stay motion.

Prods. Liab. Litig., 236 F. Supp. 2d 445, 463 (E.D. Pa. 2002), for proposition that "money once paid to *improper recipients* is unlikely ever to be recouped" (emphasis added)). Movants cite other cases concerning situations involving *disputed* payments that might prove, following appeal, not to have been properly owed or payable at all – making the harm of being unable to recoup indeed irreparable. *See, e.g.*, *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 795-96 (6th Cir. 1998) (observing stay had been granted where district court order required agency to incur costs of nearly $2 million to identify and notify individuals of potential eligibility for hundreds of millions of dollars of benefits to which individuals were not entitled); *Stephens v. Childers*, No. 94-6525, 1994 WL 761234, at *1 (6th Cir. Dec. 13, 1994) (granting stay where district court order would have required state to make $50 million in challenged payments).

The situation here is completely different. And the present dispute is unlike other disputes in this case over such issues as the proper eligibility standard for certain categories of disease payments, where the outcome of Dow Corning's appeal determined whether those claims were payable at all. Here, in contrast, the relevant claimants have already qualified for and received payment on their basic disease and/or rupture claims. They are, therefore, *automatically* and undisputedly entitled to Premium Payments, subject only to a finding of adequate funding. Movants themselves acknowledge that the question of *whether* Premium Payments

ought to be distributed to claimants is not in dispute; the only issue is *when* – not *if* – claimants should be paid. *See* Movants' Br. at 11 (expressing concern about "premature distribution of Second Priority Payments").

Given this crucial distinction, Movants cannot allege any significant harm to the Trust or Dow Corning that could flow from denial of a stay. In the improbable event that the Order is reversed on appeal, the "harm" to the Trust itself would consist only of the lost interest income on the funds used for Premium Payments from the date paid through the later-determined date at which they *should* have been paid. Any impact on Dow Corning itself is even more remote. More than $130 million remains in the Trust – the residual amount not yet paid out from Dow Corning's $1 billion initial payment, insurance proceeds paid to the Trust pursuant to the settlement, and interest thereon. Movants' Ex. 2.[6] Movants do not suggest that the funds remaining in the Trust are not adequate to cover any payments that will be made pending this appeal, and indeed the backlog of allowed Second Priority Payments and other immediately payable claims in the Trust total less than $40 million. *Id*. Thus, denial of a stay will have *zero* immediate impact on Dow Corning. Whatever impact the timing of Premiums might have on the timing (and thus time value) of Dow Corning's *future* contributions to the Trust is

[6] Indeed, through all the years the SF-DCT has been in operation, Dow Corning has not been called upon to supply even *a single cent* of the hundreds of millions of dollars in remaining Annual Payment Ceilings that have rolled forward with seven percent interest accruing annually.

not immediately apparent on the record – and, once again, Movants do not even articulate, much less substantiate and quantify, any such supposed "harm."

Lacking any meaningful harm themselves, Movants instead appoint themselves guardians of the tort claimants, arguing that the Order creates a "significant risk to the payment of future first priority claims" (Movants' Br. at 4) and an "appreciable risk that future claimants will not receive their full settlement payments" (*id.* at 6). But this is mere conclusory rhetoric, unsupported by anything in the record. To the contrary, the record overwhelmingly establishes that any such risk – given the $300 million cushion, dwindling claim flow, and short time remaining in the settlement – is tiny and far-fetched to the point of near impossibility.

These facts stand in stark contrast to cases cited by Movants in which there was a serious and immediate risk of loss of particular funds or other concrete consequences rendering it *highly likely* if not certain that absence of a stay would cause irreparable harm or render a judgment worthless. *See Shipper Serv. Co. v. Fresh Louie's Produce Co.*, No. 10-CV-10528, 2010 WL 726242, at *2 (E.D. Mich. Feb. 24, 2010) (Hood, J.) (finding requisite harm when "debtor is in financial distress" and beneficiary, in absence of injunction, "would be unable to collect on the debt"); *see also, e.g.*, *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 139 (3d Cir. 2000) (adequate harm shown when

"likelihood is great that there will be no funds available" to satisfy judgment); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (absent preliminary injunction, party "will almost assuredly sell its assets," thwarting judgment); *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 924 (6th Cir. 1978) (given his "severe financial hardship," plaintiff "would have been completely 'wiped out' long before a final decision could be expected"); *Cardile Bros. Mushroom Packaging, Inc. v. Wonder-Land Invs., Inc.*, No. 09-20894-CIV, 2009 WL 10668424, at *3 (S.D. Fla. Apr. 15, 2009) (granting injunction based on "likelihood" that particular "assets used to fund the trust in Plaintiff's benefit may be permanently depleted"); *S.E.C. v. Dowdell*, No. Civ.A.3:01CV00116, 2002 WL 31357059, at *3 (W.D. Va. Oct. 11, 2002) (granting stay based on "significant likelihood of actual and imminent harm due to dissipation of Receivership property"); *In re Santa Fe Med. Grp.*, No. 15-11247-T11, 2015 WL 9261764, at *4 (Bankr. D.N.M. Dec. 17, 2015) (enjoining insolvent defendant from spending particular funds whose ownership was in dispute, creating "risk that no meaningful decision on the merits could be rendered"); *In re Suprema Specialties, Inc.*, 330 B.R. 93, 95 (Bankr. S.D.N.Y. 2005) (granting stay to prevent "substantial harm" flowing from dispersal of specific insurance proceeds in which movants claimed an interest).

Movants have failed to demonstrate even a reasonable possibility, much less a substantial likelihood, of the type of irreparable harm that supported stays and injunctions in those cases. In such circumstances, a stay is inappropriate. *See CRP/Extell Parcel I, L.P. v. Cuomo*, 394 F. App'x 779, 782 (2d Cir. 2010) (denying relief based on "speculative allegations" and "conclusory assertions" that defendant-appellees "might 'spend' the escrow monies and later become insolvent").

Moreover, unlike the litigants and bankruptcy creditors in those cases, every settling tort claimant here voluntarily agreed to a negotiated package of benefits and risks – including the opportunity to receive Premium Payments *during* the course of the settlement once funding was adequately assured, in return for a tiny risk that, if the funding cap were to be exceeded towards the end of the settlement program, there might be a proportional reduction in claim payments to the relatively few remaining claimants affected by the shortfall. The Plan expressly warned of this risk. *See* SFA § 7.03(d). With all claimant fiduciaries and neutrals in the case satisfied that the risk is now small enough to support partial Premiums, Dow Corning, whose only motivation is delay, should not be permitted to re-impose a bankruptcy-like requirement of strict absolute priority that would harm thousands of claimants in order to eliminate a tiny risk for a relative few.

In short, any harm that might flow from the Court's Order pending appeal is remote, contingent, and speculative. But to justify a stay, "the harm alleged must be both certain and immediate, rather than speculative or theoretical." *Griepentrog*, 945 F.2d at 154 (citation omitted); *see also Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 371 B.R. 210, 239 (E.D. Ky. 2007) ("[A]lthough Zurich believes the administrative expense pool will be entirely depleted if a stay is not granted during the pendency of the appeal, Zurich's argument is speculative on this point.").

C. Claimants Would Suffer Irreparable Injury If This Court's Order Were Stayed

In contrast to the speculative or nonexistent injuries to Movants, claimants would be immediately and irreparably harmed by the granting of a stay. As the Court is aware, claimants have already been waiting for years to receive Premium Payments that were marketed as a key benefit of the settlement. Many of these claimants are dependent on their settlement recoveries (including Premiums they have already earned) to meet basic living expenses or pay medical bills; others have died waiting. The real-life consequences of delay that claimants will necessarily endure should a stay be granted – the real harm of not having money that you need *today*, not just the loss of "a very small amount of interest" (Movants' Br. at 12), as Dow Corning sees it from the corporate perspective – far outweigh Movants' imaginary harm discussed above.

Movants' suggestions that a stay "merely preserves the status quo" (Movants' Br. at 14) and creates "very little hardship" for claimants (*id*. at 12) are` false and, indeed, cruel. In 1999, Dow Corning's expert testified that Premium Payments would be paid seven years later. Confirmation Hr'g Tr., June 29, 1999 (Docket No. 848-3) at 303. Even allowing for delays in implementing the Plan, we are at least *six years* past that point in the settlement program – closing in on the fourteenth anniversary of the Effective Date. The Finance Committee concluded in 2011 that projections were adequate to support paying 50 percent Premiums. Today, with less than 16 months remaining in the program, the cushion is significantly larger and the risk correspondingly smaller. Indeed, even paying the majority of the 50 percent Premiums has had no negative effect on solvency. Meanwhile, remaining claimants die waiting for their full relief while others fall out of touch with the Settlement Facility. Even claimants who live to receive their full settlements are harmed irrevocably by delay because the settlement provides claimants no interest or cost-of-living adjustments.

Courts in other mass tort cases have recognized this reality in stressing the importance of timely implementation of settlements. For example, in *Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001), the court denied defendant's stay request, noting the consequences of deferring benefits owed to injured plaintiffs. *See id.* at 441 ("What is certain is that delay where plaintiffs have

mesothelioma, asbestosis, or pleural disease, or where decedents' survivors await compensation for support substantially harms those parties."); *see also W.R. Grace*, 2008 WL 5978951, at *8 ("The fact that claimants have been dying for some time in no way undermines the very real harm they continue to suffer. In the case of [these] Claimants, justice deferred may well be justice denied.").

A stay in this case "will only serve to delay a distribution to . . . claimants who have been waiting years for some type of resolution," *Reaves ex rel. GTI Capital Holdings, LLC v. Comerica Bank-CA (In re GTI Capital Holdings, LLC)*, No. 03-07923-SSC, 2008 WL 961112, at *10 (Bankr. D. Ariz. Apr. 4, 2008), and thereby provide Movants with the very relief that they seek – *i.e.*, the distribution of Premium Payments later rather than sooner – even after the Court charged with deciding the question has ruled and all that is pending is a demonstrably weak appeal. Indeed, this time around the effect is even starker, since a stay would effectively give Dow Corning a complete victory by eliminating *any* ability for these claimants to be paid, as they bargained for, *during* the settlement process rather than at the very end.

Courts have consistently recognized the impropriety of granting stays that have such an effect. *See, e.g.*, *Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958) (rejecting stay pending appeal that would "give appellant the fruits of victory whether or not the appeal has merit"); *Reynolds Metals Co. v. Sec'y of*

Labor, 453 F. Supp. 4, 7 (W.D. Va. 1977) (where stay would provide moving party "all of the ultimate relief sought" on appeal, "the court will not grant a stay"); *see also SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 n.4 (10th Cir. 1991) (injunction awarding essentially full relief disfavored because it is "similar to the 'Sentence [F]irst–Verdict Afterwards' type of procedure parodied in Alice in Wonderland, which is an anathema to our system of jurisprudence"), *overruled on other grounds*, *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc).

D. The Public Interest Disfavors a Stay

Finally, the public interest argues strongly to defeat a stay. Against the desire of Movants to preserve some favorable, attenuated impact on the time value of Dow Corning's payments – and eliminate a tiny, wholly speculative risk that the funding cap might be reached at the very end of the settlement program – must be weighed the compelling public interest in providing promised redress to injured claimants and, indeed, preserving public confidence in the ability of the judicial system to implement and administer a settlement effectively and efficiently. Accordingly, the public interest favors permitting the SF-DCT to continue to process and pay as many of these long-delayed claims as possible while claimants are alive and able to benefit from the funds disbursed.

CONCLUSION

For the foregoing reasons, the Motion to Stay should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 1, 2018, I electronically filed a copy of the foregoing Response of Claimants' Advisory Committee in Opposition to Motion to Stay the Court's Order Regarding Partial Premium Payment Distribution with the Clerk of the Court 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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