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 KOREAN CLAIMANTS' MOTION 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 recommendation to authorize completion of 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 fulfilment of the promise made to claimants more than 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 (the "Motion") [ECF No. 1610] to stay, pending appeal to the Sixth Circuit, this Court's June 24, 2021 Memorandum Opinion and Order (the "Order") [ECF No. 1607] authorizing the distribution of all remaining Second Priority Payments.

As this Court knows, the Plan promised breast implant claimants more than 20 years ago that, if sufficient funding existed, the Settlement Facility – Dow Corning Trust ("SF-DCT") would issue Premium Payments (or "Premiums") to all settling claimants with approved and paid disease and rupture claims. Sections 7.01 and 7.03 of the Settlement Facility Agreement ("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. These provisions have been implemented conservatively over several years:

- In 2013, 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 Court authorized 50 percent Premiums, 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. *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473 (6th Cir 2015).
- In 2018, the Court determined that the heightened standard had been met and authorized the completion of 50 percent Premiums and 50 percent of other Second Priority Payments; the Sixth Circuit affirmed that decision later in 2018; and as a result 50 percent Premiums have been paid since then on an ongoing basis.

Following the closing of the SF-DCT to new claim filings in 2019 and a period of reviewing and quantifying filed claims, the IA concluded that adequate funding exists to assure payment of all remaining First Priority Claims even with approval of all Second Priority Payments, with a vast cushion that readily satisfies the Sixth Circuit's "virtual guarantee" test. *See* Report of Independent Assessor, December 21, 2020 ("IA Report") at 16 (Exh. C to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments, December 23, 2020 ("Recommendation") [ECF No. 1566]. The Finance Committee endorsed that conclusion and requested approval of full Second Priority Payments. Recommendation at 9.

In the June 24, 2021 Order, the Court accepted the Recommendation; confirmed the obvious fact that there is an ample funding cushion that would not be

consumed even by full approval of all pending claims; and approved issuance of all remaining Second Priority Payments. Order at 27. Movants filed a notice of appeal on June 29, 2021 [ECF No. 1608] and the Motion on July 20, 2021.

Misapplying the familiar four-part balancing test, Movants fail to make a valid showing on *any* of the factors: They identify no legitimate appellate issue related to adequacy of funding, instead vaguely referencing *other* disputes with the SF-DCT that are unaffected by authorization of Second Priority Payments; they articulate no irreparable harm to Korean Claimants pending appeal, and indeed admit that adequate funding exists to pay any claim to which they may be entitled; they offer no justification for inflicting further harm on *other* tort claimants by unnecessarily delaying these long-overdue payments; and they fail to articulate how inflicting such harm on thousands of other claimants – while bestowing no benefit on the Korean Claimants – could possibly be in the public interest.

ARGUMENT

To obtain a stay pending appeal under Fed. R. App. P. 8(a),[1] 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 that they will suffer irreparable harm absent a stay; (3) the prospect that others will

[1] 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).

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)).

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 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.

A. The Appeal Has No Likelihood of Success on the Merits

Movants concede adequacy of funding, the issue on which the Order turns, and raise only one potential appeal issue: that the Recommendation was issued by the Finance Committee at a time when it had only two members. However, SFA § 408(e) authorizes the Finance Committee to operate by majority vote – *i.e.*, through the decision of two members. Moreover, the Court found that this issue was "moot" because the Finance Committee was fully reconstituted and supported the Recommendation. Order at 24-25.

Movants state that they "do not agree" with this decision because "a breach of the Settlement Facility Agreement on composition of committee and its operative requirements cannot be excused" (Motion at 2), but fail to explain how it violates the SFA for the Finance Committee to operate with a vacancy so long as a majority supports the action taken. Movants do not establish that this argument has *any* chance of succeeding, much less that it is *likely* to succeed in overturning the Order and disrupting the completion of payments to thousands of claimants.

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.[2]

Movants articulate no harm that could flow to them from the denial of a stay. Instead, they complain about the treatment of their individual claims by the SF-DCT and Finance Committee, which they suggest, without elaboration or substantiation, "have been working for the Class 5 Claimants" – such that the Korean Claimants are "likely to be ignored and disregarded" if Premiums are paid pending appeal. Motion at 2. On information and belief, Movants' allegation that the SF-DCT "cut off any possibility" of Premiums for Korean Claimants (*id.*) is incorrect; in fact, many Korean Claimants *have* been approved for their first 50 percent payments and are ready to be paid, but their counsel refuses to provide the Settlement Facility with confirmation of his clients' current addresses, which is required of *all* claimants, not just the Korean Claimants. In any event, Movants do not explain how paying valid Class 5 claims affects them or makes it less likely that their own claims will be approved. They thus do not coherently allege *any* harm, much less irreparable harm.

[2] 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.

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 far outweigh Movants' imaginary harm discussed above.

Movants argue that other Claimants will not be harmed by the delay because there is plenty of money to pay all claims and the SF-DCT is scheduled to complete payments by 2022. Motion at 3. But the adequacy of funding only underscores the *lack* of prejudice to Movants, who will receive whatever payments they are entitled to based on their individual claim documentation and the outcome of other motions and appeals having nothing to do with the decision on Second Priority Payments. At the same time, there is no guarantee that all claims will be processed and paid by 2022 if the second 50 percent installment on Premiums for thousands of Claimants is delayed for months pending appeal.

Even a few months delay will inflict irreparable harm on many claimants. Those who have already verified their addresses with the SF-DCT – a prerequisite to receiving Premiums – are poised to receive payments immediately, but if those payments are stayed their verifications may expire and need to be renewed. Claimants will continue to die waiting for their full relief, while others may move, fail to re-verify their addresses, and never receive payment. 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 & Co. v. Libby Claimants (In re W.R. Grace & Co.)*, No. 01-1139, 2008 WL 5978951, at *8 (D. Del. Oct. 28, 2008 ("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."), *aff'd*, 591 F.3d 164 (3d Cir. 2009).

D. The Public Interest Disfavors a Stay

Finally, the public interest argues strongly to defeat a stay. The Korean Claimants advocate only for themselves and have not identified any way in which paying legitimate claims of other claimants out of the ample remaining funds will prevent them from receiving whatever payments *they* may be entitled to under the terms of the Dow Corning settlement. Meanwhile, there remains a compelling public interest in providing promised redress to *other* 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 should be denied.

Dated: New York, New York
August 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 3, 2021, I electronically filed a copy of the foregoing Response of Claimants' Advisory Committee in Opposition to Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments 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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