IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE	§	CASE NO: 00-CV-00005-DT
	§	
DOW CORNING CORPORATION,	§	(Settlement Facility Matters)
	§	
Reorganized Debtor	§	
	§	Hon. Denise Page Hood

THE FINANCE COMMITTEE'S RESPONSE IN OPPOSITION TO THE KOREAN CLAIMANTS' MOTION TO STAY THE COURT'S RULING GRANTING THE FINANCE COMMITTEE'S MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

STATEMENT OF THE ISSUE PRESENTED

Should the Court stay its Memorandum and Order authorizing Second Priority Payments (the "Order") (ECF. No. 1607) when the Korean Claimants have failed to satisfy any of the factors required to obtain a stay in the Sixth Circuit?

Short answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. App. P. 8(a).

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

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

The Finance Committee of the Settlement Facility Dow-Corning Trust ("SF-DCT") files this response in opposition to the Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments (the "Motion") (ECF No. 1610) and would respectfully show as follows:

BACKGROUND

The Court has presided over three rounds of litigation related to the distribution of Second Priority Payments. In each round, the Court has issued an order authorizing the Finance Committee to make Second Priority Payments, in whole or in part, and in each round, a party, like the Korean Claimants, moved to stay the Court's order.

The Court denied the requested stay in round one, as did the Sixth Circuit Court of Appeals, despite there being a serious dispute concerning the standard applicable to the Court's decision to authorize Second Priority Payments. *See* ECF No. 954 (denying stay); *In re Settlement Facility Dow Corning Tr.*, 2014 WL 4824822, (6th Cir. Mar. 31, 2014) (denying stay); *In re Settlement Facility Dow Corning Tr.*, 592 F. App'x 473, 479–80 (6th Cir 2015) (holding that the Plan required a "virtual guarantee" that First Priority Payments would be made before Second Priority Payments could be authorized).

Round two had the benefit of the Sixth Circuit's articulation of the applicable standard—the virtual guarantee standard—but how the Court should apply that standard was still an open question. So when presented with a stay request in this round, the Court granted the stay (even though it found that the movant was not entitled to one) based on the Finance Committee's agreement to delay issuing payments until the Sixth Circuit provided certainty on how to apply the virtual guarantee standard. ECF No. 1459 at 10–11. The Sixth Circuit later affirmed the Court's second authorization of Second Priority

Payments, holding that the Court properly applied the virtual guarantee standard. *In re Settlement Facility Dow Corning Tr.*, 754 F. App'x 409, 417 (6th Cir. 2018).

Guided by the Sixth Circuit's prior rulings, the Court has for the third time authorized distribution of Second Priority Payments. ECF No. 1607 at 27. The Court granted this authorization after conducting a careful and thoughtful analysis of the Independent Assessor's Report, which concluded, based on conservative and overinclusive assumptions, that a surplus of at least $172.6 million will remain after both First and Second Priority Payments are made. And unlike in previous rounds, the Independent Assessor's analysis was confined to a closed universe of claims, which eliminated previous uncertainty about the number of claims that could receive First Priority Payments and thus about the amount of money required to satisfy any potential funding obligations.

The Korean Claimants have filed a notice of appeal (ECF. No. 1608) and moved to stay the Order pending appeal. But they have failed to satisfy any of the factors necessary to show that the extraordinary remedy that a stay provides is warranted. Thus, for the reasons herein stated, the Court should deny the Korean Claimants' requested stay.

LEGAL STANDARD

Courts in the Sixth Circuit apply a four-part test to determine whether to grant a stay pending appeal: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal, (2) the likelihood that the moving party will be irreparably harmed absent a stay, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also* Fed. R.

App. P. 8(a).[1] These factors are not prerequisites that must all be satisfied before a stay may be granted, but are interrelated considerations that must be balanced together. *Id.*

The movant bears the burden to prove that a stay is warranted. *DV Diamond Club of Flint, LLC v. Small Bus. Admin.*, 960 F.3d 743, 746 (6th Cir. 2020); *Overstreet v. Lexington-Fayette Urb. Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) ("A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it."). That burden is a high one that requires the movant to demonstrate "there is a likelihood of reversal." *Griepentrog*, 945 F.2d at 153. Movants generally have "great difficulty" in meeting this burden because the district court has already fully considered the merits of the underlying action. *Id.*; *see also United States v. Omega Solutions, LLC*, 889 F. Supp. 2d 945, 948 (E.D. Mich. 2012) (recognizing the high burden and noting that "[t]his high standard is justified because there is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record" (internal alterations, quotation marks, and citations omitted)). The Korean Claimants cannot satisfy their high burden.

ARGUMENT

A. There is no likelihood that the Korean Claimants will prevail on appeal.

The first factor weighs heavily against granting a stay because the Korean Claimants have failed to show any likelihood of success on appeal. Rather than presenting

[1] While different procedural rules govern the power of district courts (Fed. R. Civ. P. 62) and appellate courts (Fed. R. App. P. 8) to stay an appeal, the factors governing that decision are generally the same. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Moreover, the stay factors are the same ones considered in the preliminary injunction analysis. *Griepentrog*, 945 F.2d at 153.

any substantiated basis—rooted in the Plan or other legal authority—the Korean Claimants rely only on their own say-so, stating in conclusory fashion that they "do not agree" with the Court's ruling. Mot. at 2. This falls woefully short of the Korean Claimants' burden to demonstrate "that there is a likelihood of reversal." *Griepentrog*, 945 F.2d at 153.[2]

Moreover, the Korean Claimants have failed to present any "serious questions going to the merits," a bare minimum for satisfying the first stay factor. *Id.* The Korean Claimants complain that the Finance Committee was not comprised of three members at the time the recommendation was filed. Mot. at 2. But the Plan authorizes the Finance Committee to take action through a majority vote, *see* SFA § 4.08(e), which is exactly what happened when the two-member majority of the Finance Committee engaged with the Independent Assessor and other stakeholders—for over a year—in the extensive and comprehensive process that resulted in the Report. After a thorough review of the Report and its supporting data, both Finance Committee members concluded that the $172.6 million (and probably more) surplus that would remain even after distributing First and Second Priority Payments was adequate provision to assure that all First Priority Claims would be made and thus voted to move for authorization to distribute Second Priority Payments. *See* ECF No. 1607 at 26 (finding that "at all times, there were at least two members agreeing to the recommendation before the Court"). The Korean Claimants

[2] Korean Claimants' failure to satisfy their burden is amplified by the fact that they have not provided "specific facts and affidavits supporting assertions" to prove that any of the four factors exist. *Id.* at 154. Korean Claimants instead rely on speculation, their own opinions and conclusions, and false accusations. The complete absence of any evidence to support the stay factors weighs strongly in favor of denying the Korean Claimants' requested stay.

have not made any showing—based in the Plan or otherwise—to invalidate the Finance Committee's duly authorized action that was consistent with the Plan's plain terms.[3]

Finally, as the Court observed, the Court's appointment of a Special Master moots the Korean Claimants' challenge to the Finance Committee's composition. ECF No. 1607 at 26; *see also* ECF No. 1590 (appointing Special Master and successor Claims Administrator). The Korean Claimants have failed to show that there is any likelihood of success on the merits so their requested stay should be denied.

B. The Korean Claimants have not demonstrated irreparable harm.

The Korean Claimants failed to show that they would suffer any harm—let alone irreparable harm—if their requested stay is denied. They instead rely on false, unsubstantiated, and speculative accusations. The Korean Claimants first assert that the SF-DCT has "cut off any possibility that the Korean Claimants could receive first premium payments." Mot. at 2. This is false. For one thing, the SF-DCT has tried to make both First and Second Priority Payments to eligible Korean Claimants, working diligently to verify that it has the correct addresses for these claimants, which is a prerequisite under the Court's Closing Order No. 2 for mailing payments. *See* ECF No. 1595-7 (Decl. of Ann Phillips) (attached hereto as Exhibit 1). The SF-DCT has promptly paid any eligible Korean Claimant once the claimant's address has been verified and will continue to make such payments in accordance with the Plan's terms and the Court's orders. *Id.* These facts also belie the Korean Claimants' other false and speculative accusation that they will be "ignored and disregarded." Mot. at 2.

[3] In addition, the Korean Claimants, as Settling Personal Injury Claimants, lack standing under the Plan to challenge the Finance Committee's recommendation. SFA § 7.03(a) (providing the CAC, Debtor's Representatives, Shareholders, and Non-Settling Personal Injury Claimants with the opportunity to be heard on the recommendation).

To the extent the Korean Claimants contend that the SF-DCT's distribution of Second Priority Payments would prevent them from receiving First Priority Payments, that contention is wrong. As the Court found, all First Priority Payments, which include those for eligible Korean Claimants, are virtually guaranteed even if Second Priority Payments are made. ECF No. 1607 at 27. The Korean Claimants do not challenge the Court's virtual guarantee finding, nor could they.[4] At bottom, the Korean Claimants have failed to credibly show any harm and thus their request for a stay should be denied.

C. Others will suffer harm if the Court issues a stay.

The Korean Claimants focus exclusively on the harm to other claimants, but fail to recognize the irreparable administrative harm that a stay would cause the SF-DCT. *See* ECF No. 1459 at 9 (recognizing the SF-DCT's administrative hardship as a credible harm). The Plan does not contemplate the SF-DCT existing in perpetuity, but rather envisions closure once, among other things, eligible claims are paid. The SF-DCT has been working diligently and expeditiously with the goal of winding up the SF-DCT by December 2022. A stay would severely hinder the SF-DCT's ability to process and resolve the over 62,000 remaining claims that may be eligible for First and Second Priority Payments. Moreover, it would jeopardize the SF-DCT's ability to windup its operations by December 2022 and this Court's ability to close out this prolonged litigation and its oversight of the Plan. The Korean Claimants' stay should be denied to avoid this irreparable harm.

D. A stay would not serve the public interest.

The public interest factor weighs against granting a stay. As this Court has found previously, the public interest here is to "ensure that the Plan agreed to by the parties is

[4] The Korean Claimants indeed admit that "[t]he funds held by the Settlement Facility exceed the funds necessary for distributing second premium payments." Mot. at 3.

effectively and efficiently implemented." ECF No. 954 at 6; *see also* ECF No. 1459 at 10 ("The public interest is ensuring that the Plan is interpreted and implemented properly."). The Plan, to which the Korean Claimants consented, provides that Second Priority Payments may be made and authorizes such payments if the "the District Court rules that all Allowed and allowable First Priority Claims and all Allowed and allowable Litigation Payments have been paid or that adequate provision has been made to assure such payment (along with administrative costs) based on the available assets." *See* SFA § 7.03.

The Court has again authorized distribution of Second Priority Payments in accordance with the Plan. As a result, the public interest would be served if the SF-DCT is able to implement the Plan and this Court's order efficiently and effectively so that all eligible claimants—including the Korean Claimants—receive the payment amounts to which they are entitled under the Plan.

CONCLUSION

For the reasons stated herein, the Court should deny the Korean Claimants' motion.

Dated: August 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2021, the foregoing pleading has been electronically filed with the Clerk of Court using the ECF system which will send notice and copies of the document to all registered counsel in this case.

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