Case No. 14-1090

In the United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION; DEBTOR'S REPRESENTATIVES; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED

Interested Parties - Appellants,

v.

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE

Interested Parties - Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE IN OPPOSITION TO MOTION TO STAY THE DISTRICT COURT'S RULING REGARDING PARTIAL PREMIUM PAYMENT DISTRIBUTION RECOMMENDATION BY THE FINANCE COMMITTEE PENDING APPEAL

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The Claimants' Advisory Committee respectfully submits this response in opposition to Movants' motion to stay the District Court's December 31, 2013 Order authorizing the SF-DCT to distribute to approved claimants fifty percent of the Premium Payments due them under Dow Corning's Plan.[1]

Preliminary Statement

Dow Corning promised breast implant claimants nearly fifteen years ago that, once sufficient funding was confirmed, the SF-DCT would issue Premium Payments (or "Premiums") to all settling claimants with approved and paid disease and rupture claims. RE #934, Order, Page ID #15763-65. The Plan documents specify the method for determining the existence of sufficient funds: the Independent Assessor regularly analyzes past claim approval and payment history and projects the trajectory of future claims and available funding. Based on this analysis, the Finance Committee determines when to recommend to the District Court that Premiums should be paid. *Id.*, Page ID #15765-66. In 2011, upon concluding that adequate funding existed to cover *all* future First Priority Payments as well as *at least* fifty percent of accrued and future Premiums, the Finance Committee asked the Court to authorize partial Premiums as soon as possible. RE #814, Recommendation, Page ID #12364. Now, well into 2014,

[1] Terms are abbreviated herein as they are in Movants' Motion to Stay the District Court's Ruling Regarding Partial Premium Payment Distribution Recommendation by the Finance Committee Pending Appeal ("Mot.").

Movants appeal from and seek to enjoin the District Court's Order that would finally allow that process to begin.

Misapplying the familiar four-part balancing test of *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991), and reprising the same arguments that failed to persuade the District Court, Movants fail to satisfy *any* of the factors:

First, Movants identify no serious, outcome-determinative issues presented by their appeal – much less any clear error of law or abuse of discretion that could support a likelihood of reversal. The District Court's Order merely adopts a conservative, intermediate recommendation to provide claimants with *half* of the Premiums meant to be paid long ago. This partial step was taken over the protest of the CAC, which believes there was then and still remains a sufficient cushion in the Settlement Fund to pay *full* Premiums.

Second, Movants do not establish *any* meaningful impact on Dow Corning absent a stay, much less irreparable harm. Movants misleadingly liken Premiums 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 Premiums is already fixed, subject only to available funding. Movants' fantasy of having to prosecute thousands of costly actions to recoup prematurely paid partial Premiums is virtually impossible, because the

Independent Assessor's projections establish only a remote possibility of reaching the funding cap even if *full* Premiums were to be paid – and, crucially, Dow Corning makes no effort to substantiate its claim to the contrary. Accordingly, reversal of the District Court's Order would affect only the potential *timing* of payments – which would have a negligible impact on the time value of funds in the Trust. Distribution of the fifty percent Premiums would not immediately affect Movants, because the Trust has a sufficient remaining balance to cover those payments without requiring any further funding from Dow Corning.

In contrast, a stay would inflict immediate and irreparable harm on every eligible claimant. Claimants receive no cost-of-living adjustments on any of their payments, so every day, month, and year of delay translates to compensation they will never see. 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 benefit of the bargain claimants struck, at Dow Corning's urging, fifteen years ago.

Finally, a stay would be contrary to the public interest because delay threatens to further undermine confidence in the judicial system and the settlement already strained by marked delays in implementing many aspects of the Plan.

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

Background on the Challenged Order

Dow Corning entered bankruptcy in 1995 to resolve billions of dollars in potential claims arising from harm caused by its breast implant and other silicone medical products. Four years later, the United States Bankruptcy Court for the Eastern District of Michigan confirmed Dow Corning's Plan, which established a $1.95 billion Settlement Fund to pay claims for disease, rupture, and explantation costs. To induce claimants to vote for the Plan and settle their claims, Dow Corning agreed that, once sufficient funding was confirmed, the SF-DCT would also distribute Premiums to all settling disease and rupture claimants with approved claims. RE #934, Order, Page ID #15763-65. Claimants were told that Premiums would likely start to be paid "several years" into the settlement program. RE #700, Ex. A, Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization, Page ID #10041. Additionally, Dow Corning's expert testified at the 1999 confirmation hearing that Premiums were an important incentive to encourage claimants to settle, and he projected that Premiums would be paid by the seventh year of the settlement. RE #848, Ex. B, June 29, 1999 Confirmation Hr'g Tr., Page ID #14402. Though the Plan went into effect nearly ten years ago, Premiums have yet to be paid.

To obtain the necessary authorization to pay Premiums – which are "Second Priority Payments" – the Finance Committee (consisting of neutrals

appointed under the Plan) must submit to the District Court a recommendation accompanied by a detailed accounting of claims payments and a projection of the cost of paying all pending and future base claims. RE #700, Ex. C, SFA, Page ID #10200 & 10204, §§ 7.01(c)(iv) & 7.03(a). The Finance Committee's recommendation must be informed by reports and analyses prepared by an Independent Assessor selected by Dow Corning and the CAC. *Id.*, Page ID #10186-88, §§ 4.05 & 4.08. The court may authorize full Premiums (or some portion thereof) if it finds, based on the available assets, that "adequate provision has been made to assure" payment of all base claims. *Id.*, Page ID #10204, § 7.03(a).

The SFA specifies the methodology to determine adequate funding: the Finance Committee and Independent Assessor must generate quarterly "projections of the likely amount of funds required to pay in full" all pending and future claims. *Id.*, Page ID #10200-01, § 7.01(d)(i). The SFA further specifies that such projections shall take into account all data regarding pending claims, the number and rate of claims filed, average resolution cost, and projected future filings. *Id.* For nearly a decade, Dow Corning, the CAC, and the Finance Committee have all participated in the Independent Assessor's claims analysis process. RE #934, Order, Page ID #15776. Until 2011, Dow Corning never

objected to the methodology employed by the Independent Assessor and mandated by the SFA. *Id.*

In 2011, the Finance Committee concluded that adequate funding existed to cover all future base claims as well as at least fifty percent of accrued and future Premiums. RE #814, Recommendation, Page ID #12350-64. It did so based on the "most conservative" of the Independent Assessor's projections, which showed a significant cushion for the Settlement Fund's ability to pay unexpected claims, even assuming that every unresolved contingency resulted in maximum liability to the Trust. *Id.*, Page ID #12359-60. The projected cushion depends on neither the ability to access the Trust's $400 million Litigation Fund nor defeat of Dow Corning's $200 million time value credit claim – rather, it assumes these funds are *unavailable*.

Accordingly, the Finance Committee asked the court nearly three years ago to authorize partial Premiums "as soon as possible, so that the administrative process can be completed in time to make Premium Payments beginning in 2012." *Id.*, Page ID #12364. Last December, the District Court finally determined that "there is more than an adequate provision to assure payments of both First Priority Payments and [fifty percent Premiums]." RE #934, Order, Page ID #15778. Movants now seek to enjoin the Order and stop the SF-DCT's process in its tracks.

Argument

To obtain a stay pending appeal under Fed. R. App. P. 8(a), 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 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 *Griepentrog*, 945 F.2d at 153). 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) (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))).[2]

Though the factors to consider here are the same as those the Court would weigh in evaluating the issuance of a preliminary injunction, *see Griepentrog*, 945 F.2d at 153, Movants must meet a higher burden because their motion has been made "after the district court has considered fully the merits of the

[2] Movants halfheartedly suggest in their last two paragraphs that they are entitled to a stay as of right under Fed. R. Civ. P. 62(d), which Movants concede applies only to money judgments. *See* Mot. at 18. However, the District Court's Order, which 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 devoted the bulk of their motion to analyzing the *Griepentrog* factors. Accordingly, in this Response, the CAC does the same.

underlying action." *Id.* Accordingly, this Court has instructed that, to obtain a stay pending appeal, an appellant must ordinarily demonstrate "a likelihood of reversal." *Id.* Movants fall far short of that requirement. As the District Court found in denying Movants' initial stay application below, each of the *Griepentrog* factors weighs *against* further delay.

A. The Appeal Has Little or No Chance of Success on the Merits, and Movants Fail to Substantiate Their Conclusory Arguments to the Contrary

Shying away from their considerable burden, Movants argue that, in lieu of a likelihood of success, they need demonstrate only "serious questions going to the merits" of their appeal. Mot. at 10. 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 establish *any* significant injury, their showing on the merits must be far stronger: "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [Movants] will suffer absent the stay." *Id.* at 153.

In any event, the Motion fails to identify and substantiate *any* serious issue that could actually support reversal. Three of the five issues identified are complete red herrings. First, the issue of whether the $400 million Litigation Fund would be available to pay future First Priority claims cannot lead to reversal

because the ample cushion identified by the Independent Assessor assumed access only to the separate $1.95 billion Settlement Fund. *See* RE #934, Order, Page ID #15777-78 (focusing on $68 million NPV cushion in *Settlement* Fund). Similarly, the $200 million subject to Dow Corning's time value credit claim was not part of the projected cushion calculated by the Independent Assessor. RE #814, Recommendation, Page ID #12359.[3] Finally, the District Court's alleged error in addressing only Premiums, and not the payment of other Second Priority Payments, cannot lead to reversal because it has nothing to do with the adequacy of funding to pay Premiums. The other categories of Second Priority Payments (*i.e.*, "increased severity" payments for disease claimants and certain payments to Dow Corning's shareholders) are a tiny percentage of the total payments, and the parties agreed below that they could be paid together.[4] Regardless, the Independent

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[3] In dicta, the District Court discussed whether these funds should be deemed available to pay claims, but it recognized that the Independent Assessor's report "assum[ed] Dow Corning would prevail on its claim." *Id.*, Page ID #15777. The time value credit issue is the subject of separate proceedings and will not be presented for decision on this appeal.

[4] *See* RE #826, Opposition to the Finance Committee's First Amended Recommendation, Page ID #13230 (arguing that District Court "determination of the sufficiency of Settlement Fund assets must allow for the same 50% distribution to *all* categories of Second Priority claimants"); RE #844, Finance Committee's Reply to Dow Corning's Opposition ("Finance Committee's Reply"), Page ID #14238 ("Even if Increased Severity Payments need to be paid at the same time as Premium Payments, there is more than sufficient money in the Settlement Fund to do so."); RE #848, Reply of CAC in Further Support of Finance Committee's First Amended Recommendation, Page ID #14336 (expressing "no objection to the

Assessor's projections already take account of *all* categories of claims – including *all* types of Second Priority Payments – so this issue has nothing to do with the adequacy of the Settlement Fund to pay Premiums. RE #844, Finance Committee's Reply, Page ID #14237.

Movants therefore identify only two issues going to the merits of the Premium Payment decision and fail to substantiate either one sufficiently to demonstrate either a serious appeal issue or a likelihood of reversal.

First, Movants argue that "[t]he district court failed to apply the standard requiring that First Priority Payments must be 'assured' before distributing Second Priority Payments and instead concluded that it need only find 'adequate' provision for their payment." Mot. at 12. But that is precisely the standard mandated by the SFA: the court must find that all relevant claims "have either been paid or *adequate provision has been made to assure such payments*." RE #700, Ex. C, SFA, Page ID #10200, § 7.01(c)(iv) (emphasis added); *see also id.*, § 7.01(c)(v) (authorizing simultaneous payment of higher and lower priority payments as long as timely payment of higher priority claims is "reasonably assured"). The District Court properly applied the plain language of the SFA to reject Movants' argument that payment of future claims must be virtually *guaranteed*. The court noted that a "guaranty" standard would require the

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Court authorizing Second Priority Payments due to Dow Chemical on the same percentage basis as are approved for tort claimants").

Settlement Facility to pay almost all First Priority claims before authorizing Premiums, which would be "contrary to the purpose of the Premium Payment provision" and would render it "meaningless." RE #934, Order, Page ID #15771-72. Movants have not established any likelihood that this ruling will be reversed.

Second, Movants suggest that they will challenge the *factual* basis for the District Court's discretionary judgment to adopt the Finance Committee's conservative fifty percent Recommendation. They focus mainly on the supposedly "complex" nature of the dispute, pointing to the presence in the record of hundreds of pages of exhibits and multiple expert reports. Mot. at 11. But the mere existence of such submissions does not establish that there are "serious questions" or even "complex and difficult" issues on appeal – much less a likelihood of reversal. Again, Movants' burden is to articulate *specific reasons the Order is likely to be reversed*. *See Griepentrog*, 945 F.2d at 153 ("a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal").

Movants try to frame their appeal as an attack on the District Court's decision to rely on the Independent Assessor's analysis rather than the dueling expert affidavits submitted by the parties. Mot. at 6. But they do not offer any persuasive reason to forecast reversal of the District Court's sensible ruling that Dow Corning had agreed in the Plan documents – and through years of

unequivocal participation in the Independent Assessor's projection process – to rely on the very methodology that it now denigrates as based on "a series of untested assumptions." Mot. at 12. As noted above, the court followed precisely the process dictated by the Plan documents: It considered and evaluated the Finance Committee's Recommendation, which was itself informed by the Independent Assessor's analysis. Rejecting Movants' efforts to undermine the Recommendation, the District Court properly found that: (1) "the SFA provides that the Court consider the recommendations of the Finance Committee based on the Independent Assessor's analysis and projections"; (2) Movants "participated in the Independent Assessor's claims analysis annually"; (3) Movants "participated in the selection of the Independent Assessor"; and (4) Movants never availed themselves of "the opportunity to test and challenge the Independent Assessor's Reports throughout the years." RE #934, Order, Page ID #15776.

Crediting the Independent Assessor's determination that payment of partial Premiums would still leave funds for approximately 6,550 unanticipated disease claims, the court correctly held that "there is more than an adequate provision to assure payments of both First Priority Payments and [fifty percent Premiums]." *Id.*, Page ID #15778. The SFA itself provides that this decision can be challenged on appeal only by demonstrating an abuse of discretion. SFA § 7.03(a). And the deferential standard that would apply to any underlying factual

findings further reduces Appellants' 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" for fact finding cited in rejecting likelihood of success on merits of 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 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").

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, this Court generally looks 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.

To establish irreparable harm, Movants allege mainly that, if they prevail on appeal, the SF-DCT will need to embark on the "unseemly" task of attempting to recover partial Premium Payments from the claimants who received them. Mot. at 14. Movants' argument relies on the false premise that reversal of the District Court's Order is tantamount to determining that claimants are not entitled to Premiums. *See id.* (quoting *In re Diet Drugs 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)). The other cases Movants cite also concern situations involving *disputed* payments that might prove, following appeal, not to have been properly owed or payable all – making the harm of being unable to recoup indeed irreparable.[5]

The situation here is completely different – and also unlike others in this case (*e.g.*, disputes over proper disease eligibility standards) where the outcome of Dow Corning's appeal would determine whether certain claims were payable at all. Here, 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 Premiums, subject only to a finding of adequate funding. As the District Court noted in denying Movants' first stay motion: "Premium Payments will be paid as agreed to by the Movants under the Plan, if not now, at some point in time in the life of the Plan." RE #954, Order, Page ID #15932.

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[5] *See, e.g.*, *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 795-96 (6th Cir. 1998) (stay granted where district court order required agency to incur costs of nearly $2 million to identify and notify individuals of their potential eligibility for hundreds of millions of dollars of benefits to which individuals were not necessarily entitled); *Stephens v. Childers*, No. 94-6525, 1994 WL 761234, at *1 (6th Cir. Dec. 13, 1994) (granting stay where district court's order would have required state to make $50 million in challenged payments); *Silverman v. Nat'l Union Fire Ins. Co. (In re Suprema Specialties, Inc.)*, 330 B.R. 93, 94-95 (S.D.N.Y. 2005) (granting stay of order authorizing bankruptcy trustee to remit to defendant funds in which third-party movants claimed interest).

Given this crucial distinction, the harms Movants invoke range from highly speculative to nonexistent. The Independent Assessor's projections show only a small chance that payment of *full* Premiums would result in future First Priority Payments hitting the funding cap, and a significant cushion in all scenarios if only *half* Premiums are paid. RE #934, Order, Page ID #15777-78. Movants belatedly question the Independent Assessor's general methodology, but explain no specific basis for this Court to impose a different conclusion. Nor have Movants established any irreparable harm to the Trust or themselves. The Trust is obligated to pay Premiums if there are adequate funds, and Dow Corning has never established a reasonable possibility, much less a likelihood, that the cap will be reached.[6] Thus, even in the improbable event that the Order is reversed on appeal, the "harm" to the Trust would consist only of the lost interest income on the funds used for Premiums from the date paid through the date later determined to be the appropriate payment date. Given that it is already 2014 and no Premiums have been paid, it would appear that this is limited exposure indeed.

Any impact on Movants is even more remote. Movants themselves point out that nearly $300 million remains in the Trust – the residual amount not

[6] Even in the highly unlikely event that the funding cap is minimally exceeded towards the end of the settlement program, the SFA authorizes reductions in claim payments to all remaining claimants affected by the shortfall – a risk assumed by all claimants under the settlement. *See* RE #700, Ex. C, SFA, Page ID #10205, § 7.03(c).

yet paid out from Dow Corning's $1 billion Initial Payment, additional insurance proceeds paid over to the Trust pursuant to the settlement, and interest earned on Trust assets. The funds remaining in the Trust are more than adequate to cover fifty percent Premiums and any claims payable in the ordinary course pending this appeal. Furthermore, once those funds are disbursed, Dow Corning will still have *hundreds of millions of dollars* in remaining Settlement Fund obligations, in the form of annual payment ceilings that have never been needed and thus have rolled forward each year with seven percent interest. Movants' suggestion (Mot. at 15) that all of these funds could be spent and the $400 million Litigation Fund accessed during the pendency of this appeal is preposterous. Denial of a stay thus will have *zero* immediate impact on Movants. Whatever impact the timing of Premiums might have on the time value of Dow Corning's *future* contributions to the Trust is not apparent on the record – and Movants do not even articulate, much less substantiate and quantify, any such supposed "harm."

In short, any impact that the District Court's Order *may* have on Dow Corning (let alone the Debtor's Representatives and Dow Corning's shareholders) 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 the District Court's Order Were Stayed

In contrast to the speculative or nonexistent injuries to Movants, claimants would be immediately and irreparably harmed by a stay. Claimants have already been waiting 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 such delay far outweigh Movants' illusory harm discussed above.

Movants' suggestion (Mot. at 16) that a stay would "merely preserve the status quo" and "not create any significant hardship" for claimants is false and, indeed, cruel. In 1999, Dow Corning's expert testified that Premiums would be paid seven years later. RE #848, Ex. C, June 29, 1999 Confirmation Hr'g Tr., Page ID #14402. Even allowing for delays in Plan implementation, it is now more than two years past that point in the settlement program – close to the tenth anniversary of the June 2004 Effective Date. The Finance Committee concluded *in 2011* that projections were adequate to support paying fifty percent Premiums, and nothing that has happened since has changed the trajectory of those projections,

with roughly five years remaining in the program. Meanwhile, claimants die waiting for their full relief; others fall out of touch with the Settlement Facility; and *all* claimants are harmed irrevocably by delay because the settlement provides them 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, 441 (5th Cir. 2001), the court denied defendant's stay request, noting the consequences of deferring benefits owed to injured plaintiffs. *See also W.R. Grace & Co. v. Libby Claimants (In re W.R. Grace & Co.)*, No. 08-246, 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).

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-Cal. (In re GTI Capital Holdings, LLC)*, No. 03-07923, 2008 WL 961112, at *10 (Bankr. D. Ariz. Apr. 4, 2008), and thereby provide Movants with the very relief that they seek on the merits – *i.e.*, the delayed distribution of Premiums. Courts have consistently recognized the impropriety of granting such stays. *See, e.g.*, *Jimenez v. Barber*,

252 F.2d 550, 553 (9th Cir. 1958) (rejecting stay 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").[7]

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 attenuated benefit for the timing of Dow Corning's payments must be weighed the compelling public interest in "ensur[ing] that the Plan agreed to by the parties is effectively and efficiently implemented." RE #954, Order, Page ID #15933. Movants' assertion of a "serious risk" that payment of fifty percent Premiums would impair the ability to make future First Priority Payments is unsubstantiated bluster. The public interest favors permitting the SF-DCT to continue to process and pay these long-delayed claims while claimants are alive and able to benefit.

This case stands in stark contrast to those in which serious evidence was presented that available funds could be "wiped out" or irrevocably released to

[7] *See also SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (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 by O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc).

ineligible persons before a final decision was rendered. *See 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"). Whatever issues Movants attempted to raise during adjudication of this dispute, they have not made any showing on this motion that the Independent Assessor incorrectly evaluated the Trust's funding cushion or that the District Court clearly erred or abused its discretion in adopting the Finance Committee's Recommendation.

Conclusion

For the foregoing reasons, Movants' motion to stay should be denied.

Dated: March 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 10, 2014, I electronically filed a copy of the foregoing Response of Claimants' Advisory Committee in Opposition to Motion to Stay the District Court's Ruling Regarding Partial Premium Payment Recommendation By the Finance Committee Pending Appeal 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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