UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	
Settlement Facility Dow Corning Trust	§	**Case No. 00-CV-00005** **Honorable Denise Page Hood**

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

STATEMENT OF ISSUE PRESENTED

This motion presents the question of whether or not the Court should stay the Memorandum Opinion and Order Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments ("SPP Ruling") pending appeal to the Sixth Circuit, where: (a) the decision of the court authorizes payment of an uncapped and unknown amount from a limited fund to pay lower priority second payments; (b) such payments could deprive the claimants entitled to higher priority First Priority Payments of their full compensation due under the Dow Corning Amended Joint Plan of Reorganization (the "Plan"); (c) the only harm to the second priority claimants is a limited delay; and (d) the SPP Ruling fails to apply the Sixth Circuit's virtual guarantee standard and thus violates the Plan.

STATEMENT OF CONTROLLING AUTHORITY

Fed. R. Civ. P. 62

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

In re Settlement Facility Dow Corning Trust, 592 Fed. Appx. 473, 479 (6th Cir. 2015)

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

INTRODUCTION

Dow Corning Corporation ("Dow Corning") and the Debtor's Representatives (together, "Movants") respectfully request that the Court stay its Memorandum Opinion and Order Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments ("SPP Ruling") pending appeal to the United States Court of Appeals for the Sixth Circuit. Movants filed a Notice of Appeal today.[1] A stay is necessary and appropriate: the SPP Ruling creates a significant risk to the payment of future first priority claims. The SPP Ruling authorizes the distribution of an uncapped and uncertain amount from a limited settlement fund to provide lower priority second payments to claimants who have already received First Priority Payments.[2] The harm is irreparable. Once the SF-DCT makes payments to tens of

[1] Movants adopt and incorporate by reference the record in connection with The Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments ("Recommendation" or "FC Motion"), including all arguments, briefs, exhibits and expert reports and declarations submitted and/or made by the Movants in their prior briefing of the Second Priority Payments issue, and reserve and do not waive the right to raise these issues on appeal. *See* Doc. # 1287, 1288, 1289, 1307, 1308, 1323, 1325. Movants do not reiterate those arguments here as the Court is familiar with the issues and the Movants' positions. Unless otherwise defined, capitalized terms herein have the meanings provided in the Movants' prior briefing on this issue.

[2] While no one knows the aggregate amount that would be paid under the SPP Ruling, the minimum amount that would be paid as Premium Payments to claimants whose claims were paid before July 2016 alone plus the amount that would be payable to the Class 16 claimant would exceed multiple tens of millions of dollars. IA Report (FC Motion Exh. B) (Doc. #1279-2), at 18. Additionally, distributions pursuant to the Increased Severity Option 1 fund—which is the only future payment that is knowable—will add over $20 million more. *Id.* at 18, 81.

thousands of individual claimants, it is not realistic to expect those monies to be returned to the fund. After the Court's last distribution order—which was not stayed but was later reversed on the merits by the Sixth Circuit—the SF-DCT paid more than $92 million in erroneous payments that has not been recovered and thus is not available to pay the first priority claims. IA Report at 15. A stay is necessary to avoid compounding the potential shortfall of funds thereby created.

Conversely, there is nominal harm if the second payments are stayed. Every individual claimant currently eligible for a Second Priority Payment has already received a First Priority Payment.[3] And because the claim filing deadline is less than 17 months away, it soon will be possible to determine accurately the availability of funds, which means that if funds are sufficient, the SF-DCT will be able to issue first and second priority payments together—saving costs and time. The public interest favors an outcome where future claimants receive the First Priority Payments to which they are entitled, and eligible claimants receive second payments as promptly as possible while guaranteeing that no future claimant is deprived of a First Priority Payment.

Movants are likely to prevail on the merits on this appeal because the Court's SPP Ruling creates appreciable risk that future claimants will not receive their full

[3] The Class 16 claimant has not received a First Priority Payment. The Class 16 claimant does not object to a stay.

settlement payments. That is the exact opposite of a "virtual guarantee" that *all* future claimants *will* receive their first priority settlement payments before Second Priority Payments may be distributed—as required by the Sixth Circuit's prior ruling in this matter. No one knows how many claimants will file first priority claims in the next 17 months. This Court relied on a calculation which is based on the assumption that only 3% of the eligible individuals will actually file their claims. Hinton Reply Dec. (Exh. A to DCC Reply) (Doc. #1308) at ¶ 49 and Tables 2.1 and 3.[4] The IA admits that this is nothing more than an assumption that is not and cannot be "virtually guaranteed" and that it as well as the other assumptions could be wrong. *See* Exh. B to DCC Response (ANKURA Response to Questions for IA on Final Report) (Doc. #1289), at 11-14. Given the substantial uncertainty about the number of new claimants who will file claims and the number who will cure deficient claims, it is not possible to conclude that all future claimants are "virtually guaranteed" their First Priority Payment, as the Plan and Sixth Circuit require, if the second priority distribution goes forward.

The Court should also take into consideration the Settlement Facility's Notice Plan (to start later this month) by which it will notify over 140,000 individuals, including the 87,000 Class 5 claimants who have the right to perfect or file a first

[4] The assumption for Class 5 claimants alone is that only 2,000 out of 72,000 will file claims. *Id*. at Table 2.1.

priority claim. *See* Exhibit 1, Stipulation and Order approving Notice of Closing and Final Deadline ("Notice") and Notice Plan Overview ("Notice Plan"); Hinton Reply Dec. at ¶ 46 and Table 3.[5] The Facility will achieve this extensive outreach by mail and through on-line mechanisms. The Independent Assessor 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. IA Report at 3, 6. Given the lack of any significant harm to claimants seeking a second payment, and the substantial harm that will befall first priority claimants should the funds be insufficient, a stay to preserve the status quo is warranted and prudent.

[5] In addition to the 87,000 Class 5 Claimants, additional individuals who will receive notice include Class 6.1 and 6.2 Claimants who have not received a First Priority Payment and other individuals who have already received a First Priority Payment but retain the right to appeal or in some cases file a new first priority disease claim. *See* Exhibit 1 (Notice).

ARGUMENT

Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8(a)(1)(A) authorize this Court to stay the SPP Ruling pending appeal. *See* Fed. R. App. P. 8(a)(1) (addressing stays of money judgments and injunctions); Fed. R. Civ. P. 62(c) (addressing stays of injunctions); Fed. R. Civ. P. 62(d) (addressing stays of money judgments). A stay is warranted, equitable and necessary.

A. All of Rule 62(c)'s Factors for a Stay are Satisfied Here.

The Sixth Circuit has identified four factors in determining whether a stay is warranted: (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 Grutter v. Bollinger,* 247 F.3d 631, 632-33 (6th Cir. 2001) (reversing district court's denial of stay pending appeal); *Michigan Coal. of Radioactive Material Users, Inc.* v. *Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991) (granting stay pending appeal). *See also Hilton* v. *Braunskill,* 481 U.S. 770, 776 (1987) (factors are the same under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Michigan Coal.,* 945 F.2d at 153. The relationship between these elements is "inversely proportional,"

such that a stronger showing of harm to the movant reduces the probability of success on appeal required. *Id.* All factors favor a stay here.

1. Absent a Stay, the Higher Priority Claimants Face Irreparable Harm.

Without a stay, Second Priority Payments would be distributed before the appeal is resolved. The immediate distribution of the Second Priority Payments creates a risk—one that certainly exceeds 1% (the Sixth Circuit's standard)—that future first priority claimants will not be paid in full. At issue is the misallocation of a limited fund in violation of the Plan. If the Plan is not implemented as written, the wrong claimants will be paid. Such harm cannot be rectified because it will not be possible to recoup the funds once distributed to thousands of individuals. *See In re Diet Drugs*, 236 F. Supp. 2d 445, 463 (E.D. Pa. 2002) (finding elements of preliminary injunction satisfied and stating"[r]ealism dictates that money once paid to improper recipients is unlikely ever to be recouped.").[6]

[6] The Sixth Circuit recognizes that irreparable harm is found when a party would not be able to recoup funds spent pending appeal. *See Chambers v. Ohio Department of Human Services,* 145 F.3d 793, 795-96 (6th Cir. 1998) (Sixth Circuit reversed denial of a stay pending appeal where the district court ordered a change in Ohio's Medicaid payment policies that would have required the State to make hundreds of millions of dollars in additional payments); *Stephens v. Childers*, 1994 WL 761234, at *1 (6th Cir. Dec. 13, 1994) (staying order that would have required the State of Kentucky to pay $50 million in Medicaid reimbursements to doctors).

These circumstances establish irreparable harm. Indeed, this Court has found irreparable harm in a similar situation where the dissipation of assets of a trust could result in insufficient funds for intended beneficiaries. *See Shipper Service Co., Inc. v. Fresh Louie's Produce Co.,* 2010 WL 726242, at *2 (E.D. Mich., Feb. 24, 2010) (Hood, J.)[7] (citing *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.,* 222 F.3d 132, 141 (3rd Cir. 2000)). Likewise, other courts have found irreparable harm where the disbursement of assets threatens the ultimate recovery at the conclusion of the litigation. *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) ("[d]ifficulty in collecting a damage judgment may support a claim of irreparable injury"); *Stenberg v. Cheker Oil Co.,* 573 F.2d 921, 924 (6th Cir. 1978) (granting stay where available funds could be "'wiped out' long before a final decision," thereby rendering a later judgment "meaningless."); *Cardile Bros. Mushroom Packaging, Inc. v. Wonder-Land,* 2009 WL 10668424, at *3 (S.D. Fla. Apr. 15, 2009) ("without a preliminary injunction, the assets used to fund the trust in Plaintiff's benefit may be permanently depleted to pay other creditors, resulting in irreparable harm."); *S.E.C. v. Dowdell*, 2002 WL 31357059, at *3 (W.D. Va. Oct.

[7] At issue in *Shipper* was a statutory trust created for unpaid sellers of perishable agricultural commodities under the Perishable Agricultural Commodities Act (PACA). 7 U.S.C. § 499a, *et seq*. The PACA trust preserves assets for payments to sellers who have priority over other creditors. In such cases, as here, a stay is appropriate to protect the priority beneficiary who would be irreparably harmed by expenditure of trust assets. *See Shipper,* 2010 WL 726242, at *2-3.

11, 2002) (irreparable harm factor "is satisfied where the supplier-creditor (or in this case, Receiver) shows that the trust (or Receivership estate) is dissipating and that absent injunctive relief their ultimate recovery is rendered unlikely"); *In re Santa Fe Medical Group*, 2015 WL 9261764, at *3 (Bankr. D.N.M., Dec. 17, 2015) ("Irreparable harm may be found if the movant would be unable to collect a money judgment after prevailing on the merits," an idea that "is rooted in the fact that insolvency may render otherwise compensable harm irreparable because 'there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.'") (*quoting CRP/Extell Parcel I, L.P. v. Cuomo,* 394 Fed. Appx. 779, 781 (2d Cir. 2010)); *In re Suprema Specialties, Inc.*, 330 B.R. 93, 95 (S.D.N.Y. 2005) (staying an order authorizing Chapter 7 trustee to distribute proceeds of D&O liability policies pursuant to settlement pending appeal where officers and directors would be injured significantly if proceeds were disbursed and became unavailable and where only harm to trustee was delay in payment).

The Plan imposes strict standards to protect the paramount rights of First Priority claimants for good reason: if future claimants entitled to First Priority Payments are not paid in full as a result of the premature distribution of Second Priority Payments, they will be treated differently than those claimants who filed earlier. The end result will be irreparably unequal and discriminatory treatment of

claimants in violation of the Plan, the SFA and sections 1123(a)(4) and 1127(b) of the Bankruptcy Code.

2. There is Negligible Harm to Others.

In contrast, there is negligible harm to claimants who have already received First Priority Payments and would receive an additional second payment in the absence of a stay. A stay merely preserves the status quo. *Cf. Simmons v. Stephen*, 2009 WL 1013497, at *1 (W.D. Mich. Apr. 15, 2009) (noting that "[t]ypically a stay is entered in order to preserve the status quo") (*citing Reed v. Rhodes*, 472 F. Supp. 603, 605 (W.D. Mich. 1979)). The second priority claimants have no right to distribution of Second Priority Payments at any particular time and there is very little hardship to require these claimants—who have already been paid their First Priority Payments—to wait until it can be evaluated and determined whether there is actually "assurance" that the rest of the pending and future first priority claimants can be paid in full, as required in the Plan. At most, the harm to any one individual would consist of a very small amount of interest that could be earned on payments typically of $1000 to $5000. *See* SFA Annex A (Exh. B to DCC Reply) (Doc. #1307-2), at A-8, A-13-14 (setting forth Premium Payment amounts). Such circumstances warrant a stay. *Tri-State Generation*, 805 F.2d at 357 ("mere postponement" of sale of assets in order to maintain the status quo presented less "relative harm" than forcing party to immediately liquidate assets).

3. Movants are Likely to Succeed on Appeal and the Appeal Raises Serious and Complex Questions of Law.

The probability of success on appeal supporting a stay pending appeal is "inversely proportional to the amount of irreparable injury" that threatens the appealing party. *Mich. Coal.*, 945 F.2d at 153-54.; *see also Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d 794, 798 (E.D. Mich. 2003). Thus, a stay is warranted where there are serious questions on the merits and irreparable harm to the movants "that decidedly outweighs any potential harm to the [non-movant] if a stay is granted." *Mich. Coal.*, 945 F.2d at 153-54.

Here, the consequence of a mistaken distribution would be significant and unjustifiable: higher priority claimants who have a paramount right to funds could receive no compensation while the lower priority claims would receive extra payments to which they are not legally entitled. And, as noted, there is no significant harm to the claimants who would receive Second Priority Payments under the SPP Ruling. No one can dispute that the questions on the merits are serious: the interpretation of the relevant Plan provision has been the subject of at least 17 briefs, over 80 exhibits, two district court hearings and one appeal. These factors alone justify a stay.

Movants respectfully submit that they are likely to succeed on the merits. The parties agree that the Sixth Circuit's virtual guarantee standard means that the risk of error must be nearly non-existent, approximating 1% probability. *See* CAC

Response (Doc. #1285) at 15-16 (citing *In re CM Holdings, 2*54 B.R. 578, 614-16 (D. Del. 2000) and asserting that "98-99% certainty of payment" is the "appropriate level of certainty to constitute a 'virtual guarantee'"); *Marine Bank v. Weaver*, 455 U.S. 551, 551-52, 558 (1982) ("virtual guarantee" where FDIC reported that in failed bank cases 99.9% of depositors were assured of payment and 99.8% of total deposits were paid); *In re CM Holdings*, Inc., 254 B.R. at 614-16 (virtual guarantee found where risk is 1.13%). Thus, there must be sufficient verifiable information to allow the Court to quantify the risk of non-payment with specificity and confirm that such risk is miniscule—so small that there is a near zero chance that the higher priority claims will not be paid in full.

But the IA Report on which the court relied does not provide the requisite quantification. *See* Hinton Feb. 2017 Dec. (Exh. C to DCC Opposition) (Doc. #1287-2) at ¶¶ 23-24 ("The IA Report does not quantify uncertainty inherent in its projections, and cannot measure uncertainty in estimates arising from underlying drivers of claims not modeled in its methodology. Consequently, the IA Report does not and cannot provide a reliable basis for a finding that First Priority Payments would be 'virtually guaranteed'"); Hinton Reply Dec. at ¶¶ 5-31; December 23, 2011 Declaration of Mark Peterson (Exh. 4 to Hinton Reply Dec.) at ¶ 24 (stating, at a time that CAC was arguing for a lower standard, that "[i]t would be extremely difficult to aggregate these multiple computations to reach meaningful

conclusions about a forecast's statistical reliability and utility."); *see also* Exh. A to Response of Dow Corning Corporation and the Debtor's Representatives to the Supplemental Brief to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments, Transcript (Doc. #1323-2) at 37 (CAC's counsel acknowledging that the IA's methodology does not lend itself to a quantified error analysis).

The IA calculation is, instead, a result of applying dozens of assumptions—not facts—that admittedly could be wrong and none of which is "virtually guaranteed." *See* Hinton Reply Dec. at ¶ 4 and Table 1; DCC Response (Doc. #1287), at 13-16. The calculation assumes, for example, that only 3% of eligible claimants will file claims and admittedly does not quantify or account for the possibility of a higher filing rate. *See* Hinton Reply Dec. at ¶ 49 and Table 2.1. The fact is, no one knows how many will file, and reliance on these assumptions, with no examination of their certainty, reveals the calculation to be an exercise in conjecture and speculation. It turns the virtual guarantee standard into a mere "belief" standard—a lower standard that the Sixth Circuit flatly rejected.

The SPP Ruling applies this watered-down standard by citing to (i) an illustrative chart provided 18 years ago during the Plan confirmation hearing and (ii) a purported agreement to utilize the IA's projection methodology. SPP Ruling at 24-26. The only section of the SFA that mentions a future claim projection is Section

7.01(d)(i). Section 7.01(d)(i) merely lists the data the IA must take into account when preparing quarterly projections of the amount of funds required to pay all (including future) First Priority Payments.[8] Section 7.01(d) does not define or modify the controlling "assure" standard in Sections 7.01(c)(iv) and 7.03(a) of the SFA; nor does it prescribe or approve any specific methodology (assumption-based or otherwise). As the Sixth Circuit recognized, regardless of whether the IA Report meets the mechanical requirements of Section 7.01(d), it must—above all—satisfy the qualitative "virtual guarantee" requirement of Sections 7.01(c)(iv) and 7.03(a). The fact that Section 7.01(d)(i) lists data and calculations for various IA reports does not mean that the mere existence of these calculations satisfies the ultimate "assure"

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[8] Section 7.01(d)(i) provides, in relevant part:

> In conjunction with the Independent Assessor, the Finance Committee shall, commencing the first quarter after the conclusion of the opt-out process and on a quarterly basis thereafter or at the request of the District Court, prepare projections of the likely amount of funds required to pay in full all pending, previously Allowed but unpaid and projected future First Priority Payments. Such projections shall, to the extent known or knowable, be based upon and take into account all data (as of the date of the analysis) regarding (i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending Claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility. Such projections shall also state the anticipated time period for the resolution and payment of such Claims.

SFA (FC Motion, Exh. A) (Doc. #1279-1) at § 7.01(d)(i).

standard required for Second Priority Payments. *See In re Settlement Facility Dow Corning Trust,* 592 Fed. Appx. 473, 480 (6th Cir. 2015) (recognizing that Dow Corning's criticism of the Independent Assessor's projections and methodology alleges "that they do not prove what they are cited as proving, i.e., high confidence in an accurate and precise projection. *Because ARPC projections were used for many purposes that do not require a confidence estimate*, it is understandable that the Appellants did not object to the lack of a confidence estimate in those projections until the Finance Committee's motion to disburse lower-priority payments under SFA § 7.03(a) made confidence a relevant issue.") (emphasis added).

The Court's reliance on a chart submitted as an illustration during the Plan confirmation hearing nearly 18 years ago is also impermissible. Again, as the Sixth Circuit determined, the parties' intent is clearly embodied in the "assurance" language. *See In re Settlement Facility Dow Corning Trust*, 592 Fed. Appx. at 479 ("SFA § 7.03(a) makes the requisite level of adequacy clear: the provision must be so adequate to 'assure' future First Priority and Litigation Payments").

As this Court has stated, the Plan must be enforced as written. SPP Ruling at 3. Movants respectfully submit that, as in the prior decision, the SPP Ruling does not do so. Movants have a substantial likelihood of prevailing on appeal. *See Michigan Coal.,* 945 F.2d at 153-54; *W. Tenn Chapter of Assoc. Builders and Contractors, Inc. v. Memphis.,* 138 F. Supp. 2d 1015, 1027 (W.D. Tenn. 2000). *See*

also Edwards v. First American Corp., 2013 WL 12213848, at *3 (C.D. Cal. Apr. 09, 2013) (finding likelihood of success on merits of appeal under Fed. R. 23(f) supporting a stay where, *inter alia*, "the Ninth Circuit has already reversed this Court's rulings in this case once before").[9]

The Court should also consider the changed circumstances that render the 2016 IA Report incomplete. On December 27, 2017, the Court approved the Notice and Notice Plan. *See* Exhibit 1. In late January 2018, the SF-DCT will implement the Notice Plan by mailing notices to 143,000 individuals—including those individuals who are eligible to file or to perfect their first priority claims—and by providing online notice of the final deadline. *Id*., at Exh. B (Notice Plan Overview). This extensive notice program was not in place at the time of the 2016 IA Report. The IA Report makes clear that such a notice may change filing behavior so that it is not predictable from historical data and likely would change the outcome. That is, the recently-approved notice efforts will affect the assumptions about future claims and thus the calculation of future payments. IA Report at 3, 6.

[9] The Court further erred by shifting the burden to Dow Corning to demonstrate that the virtual guarantee standard is not met. SPP Ruling at 24-27. The Plan requires an affirmative finding that there is a virtual guarantee that First Priority Payments will be made in full; it does not permit distribution of Second Priority Payments on the ground that objectors have not proved the opposite.

4. A Stay Serves Substantial Public Interests.

The public-interest factor squarely supports the requested stay. The public interest is promoted here by "preserve[ing] ... the integrity" of the Trust by entering a temporary stay to avoid "seriously increas[ing] the danger that eligible persons would not be compensated under the Settlement Agreement." *In re Diet Drugs,* 236 F. Supp. 2d at 463 (preliminary injunction standard met). Recognizing that reality, the Sixth Circuit has previously granted a stay where available funds could be "'wiped out' long before a final decision," thereby rendering a later judgment "meaningless." *Stenberg,* 573 F.2d at 924; *S&M Brands, Inc. v. Summers,* 2006 WL 1804606, at *3 (M.D. Tenn. June 28, 2006) (noting the "public interest in keeping the escrow accounts fully funded for payment of future health-related claims.").

B. Movants are Also Entitled to a Stay Under Rule 62(d).

Rule 62(d) entitles a party to a stay of a money judgment as a matter of right upon posting a supersedeas bond. *Arban v. W. Publ'g Corp.*, 345 F.3d 390, 409 (6th Cir. 2003).[10] Courts also have the discretion to grant a stay without a bond where, as here, resources are preserved to satisfy the judgment if the appeal is not granted.

[10] "[T]he applicability of Rule 62(d) turns on whether the judgment involved is monetary or non-monetary" and it applies when a party is bound to pay a specific sum of money. *Titan Tire Corp. of Bryan v. United Steel Workers of Am., Local 890L*, No. 09-4460, 2010 WL 815557, at *1 (6th Cir. Mar. 10, 2010). *See also Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992). *Hebert* was a declaratory judgment involving interpretation of an insurance policy, and the court applied Rule 62(d) because a party was ordered to pay a specific sum of money.

Id.; *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 797- 98 (7th Cir. 1986); *C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501, 520-21 (E.D. Pa. 1973). The "Sixth Circuit has not outlined a specific test to guide the decision of [the] district court when considering whether to grant a request for an unsecured stay" under Rule 62(d). *Transp. Ins. Co. v. Citizens Ins. Co. of Am.*, No. 08-15018, 2013 WL 4604126, at *3 (E.D. Mich., Aug. 29, 2013). Rather, courts examine the purpose of the rule in evaluating whether to authorize a stay in the absence of a bond. *See id.* *See also Menovcik v. BASF Corp.*, No. 09- 12096, 2012 WL 5471867, at *1 (E.D. Mich., Nov. 9, 2012) (*citing Hamlin v. Charter Tp. of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998) ("[t]he framework of Rule 62(d) represents a balancing of both parties' interests")). The bond requirement under Rule 62(d) is intended to protect the status quo, that is, to protect the prevailing party "from the risk of a later uncollectible judgment" while protecting the appellant from "the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal." *Transp. Ins. Co.*, 2013 WL 4604126, at *3.

There is no basis to require a bond in this case. First, Dow Corning remains obligated to pay the full amount of the Settlement Fund (if and as necessary). Second, there are substantial assets currently in the Trust account: the market value of assets in the Trust (as of November 30, 2017, which is the most recent statement available) was [REDACTED]. *See* Exhibit 2 (excerpt of Dow Corning Qualified

Settlement Fund Trust Month Ended November 30, 2017, Report of the Financial Advisor), at Sched. 2a. Third, the assets of the Trust remain under the supervision and jurisdiction of the District Court. *See* SFA § 10.09 ("All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant). The issue here is not the *availability* of assets or the adequacy of resources to satisfy a bond, but instead the determination of the proper *recipients* of those assets. This is exactly the kind of situation where the bond requirement should be waived. *Arban v. W. Publ'g Corp.*, 345 F.3d at 409.

CONCLUSION

For the foregoing reasons, the Movants respectfully request that the Court stay its SPP Ruling pending appeal.

January 25, 2018

Respectfully submitted,

/s/ Deborah E. Greenspan
Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202)420-2201
DGreenspan@blankrome.com
Debtor's Representative and Attorney for Dow Corning Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	
Settlement Facility Dow Corning Trust	§	**Case No. 00-CV-00005** **Honorable Denise Page Hood**

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF System, which will send notification of such filing to all registered counsel in this case.

Dated: January 25, 2018

/s/ Deborah E. Greenspan

Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
DGreenspan@blankrome.com
Debtor's Representative and Attorney for Dow Corning Corporation