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**

REPLY OF DOW CORNING CORPORATION AND THE DEBTOR'S REPRESENTATIVES IN FURTHER SUPPORT OF MOTION TO STAY THE COURT'S RULING GRANTING THE FINANCE COMMITTEE'S MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS PENDING APPEAL

The CAC asserts that there is no harm because the FPPs are virtually guaranteed. But whether the Court properly interpreted the "virtual guarantee" language is precisely the question in dispute. The parties agreed nearly two decades ago to protect the FPPs by establishing a clear and stringent standard. The SF-DCT has already paid more than $92 million erroneously. A stay pending appeal is necessary to avoid compounding the risk to claimants who are entitled to first priority payments. We are mindful that the Finance Committee is sufficiently concerned about the unknown and the risks to the higher priority payments to advocate prudence and support a stay pending appeal.

I. Movants[1] and First Priority Claimants Face Irreparable Harm.

The CAC's assertion that a stay would not cause irreparable harm assumes both success on appeal and assurance of sufficient funding for first priority claimants. That argument is based solely on a "belief" in an assumption-based estimation that admittedly lacks any quantification of uncertainty (the hallmark of a virtual guarantee).

The CAC argues (CAC Resp. at 15-16) that distributions of SPPs pending appeal would not be "improper" under the case law if the SPP Ruling is reversed because recipients of those distributions are "automatically ... entitled to Premium

[1] On February 1, 2018, Dow Corning Corporation changed its name to Dow Silicones Corporation.

Payments."[2] This argument is pure sophistry. The Plan prohibits payment of SPPs without a proper determination that adequate funding for FPPs is virtually guaranteed. Contrary to the CAC's assertion, Movants' appeal of the SPP Ruling turns on the issue of *whether* – not merely *when* – additional SPPs may be issued. The whole point of the appeal is that second priority claimants would indeed be "improper" recipients if they receive SPPs at the expense of FPPs.[3]

The Court should also reject the CAC's attempt to distinguish the multitude of cases cited by Movants finding irreparable harm where dissipation of trust assets can preclude recovery by trust beneficiaries. *See* Movants Br. at 10-11. These

[2] The CAC contends that this is a 'crucial' distinction. *See* CAC Resp. at 17. They seem to believe that the only issue is the payment of Premium Payments (for which the calculation but not the entitlement is automatic). But the SPP Ruling addresses all forms of SPPs including Increased Severity Payments, which are individually determined and unknown.

[3] Similarly, the CAC fails to distinguish the Sixth Circuit cases cited by DCC that find irreparable harm when a party would not be able to recoup funds spent pending appeal (*see* Movants Br. at 9), arguing only that SPPs are not payments that might be proven not "to have been properly owed or payable at all." CAC Resp. at 16. But if the SPP Ruling is not stayed and insufficient funds are left to pay FPPs, then the SPPs authorized would, in fact, not have been "properly owed or payable." Similarly, the CAC is wrong to say that the only harm to the Trust is lost interest income – again, incorrectly assuming the question is merely *when* SPPs should be paid, not *if* they should be paid. Of course, any improper authorization of payment will cause irreparable harm to both the Trust and Movants.

cases do not, as the CAC suggests, require that the risk of dissipation is "highly likely if not certain." CAC Resp. at 18.[4]

The CAC is left with the argument that first priority claimants who have not yet filed or perfected claims somehow agreed to take on the "risk" that their higher priority payments would be reduced because they "waited" and therefore their FPPs could be used to make second payments to those who filed earlier.[5] The CAC's attempt to accuse claimants of sitting on their rights is untenable: it is not only unfair but it contradicts a core premise of the Plan. The 15-year claiming period allows claimants who are diagnosed with an eligible medical condition late in the program to receive the same compensation as those who were diagnosed early in the program. Nothing in the SFA or Plan[6] allows for a reduction in payments for first priority claimants who file late in the program to enable early

[4] In *In re Santa Fe Medical Group*, 2015 WL 9261764, at *4 (Bankr. D.N.M. Dec. 17, 2015), for example, the court held that where "an insolvent defendant holds a fund whose ownership is in bona fide dispute, the plaintiff and the Court face the risk that no meaningful decision on the merits could be rendered because the fund might be spent or seized, and could not be replenished." This is precisely the situation here. The CAC relies on *In re HNRC Dissolution Co*., 371 B.R. 210 (E.D. Ky. 2007) to argue that the harm is speculative. In *HNRC*, the court could not determine the amount of asset depletion because the cost of the relevant projects was not known. Here, it is *certain* that the SPP Ruling will deplete the Trust by a minimum of tens of millions of dollars. *See* Movants Br. at 4 n.2.

[5] *See* CAC Resp. at 20.

[6] The CAC cites to SFA § 7.03(d), a provision that addresses submission of annual financial audits and has nothing to do with reduction of payments. Section 7.03(c) (not mentioned by the CAC) allows for a pro rata reduction if "necessary to assure equitable distributions to Claimants." This language does not sanction the distribution of SPPs at the expense of FPPs.

distribution of second priority payments. Indeed, had the Plan provided such a system, it could not have been confirmed because it would have provided unequal and discriminatory treatment of claims in violation of Section 1123(a)(4) of the Bankruptcy Code, which requires the same treatment of all claims in a plan class. Movants are entitled to have the Plan implemented and enforced as written. *See* SFA §4.09(c).

II. There is Negligible Harm to Claimants Who Already Received FPPs.

The CAC asserts that the second priority claimants will be harmed because "the passage of time … thwarts the ability of claimants to realize the benefit of the bargain they struck." CAC Resp. at 4. There was no such "bargain" and no guarantee of payment. Contrary to the CAC's unsupported assertions, there are no documents that advised claimants that they would likely be paid SPPs a few years after the Effective Date.[7] The Plan requires "assurance" for a reason: there was (and still is) no way to determine with sufficient certainty the number and value of claims that will be filed. The situation could have been different: if the vast majority of claimants had elected the expedited release option by the original deadline (third anniversary of the Effective Date) – as some expected – then it may

[7] The CAC's response to the Finance Committee's response to the Motion to Stay (Doc. #1379) is replete with exaggerated claims of cruelty and dire consequences to the second priority claimants who would be subject to a stay of the SPP Ruling. The consequences to these second priority claimants – who have already received *substantial* FPP compensation – can hardly compare to the consequences to first priority claimants who could end up with no payment at all.

well have been possible to ascertain the value of the remaining potential disease claims at this time with sufficient certainty. But that did not happen.[8]

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

Movant's appeal is not, as the CAC attempts to argue, a challenge to the Court's factual findings.[9] The issue is the proper interpretation of the legal standard governing the distribution authorized by the SPP Ruling.

- The CAC incorrectly attempts to refute Movants' argument that the virtual guarantee standard requires a quantification of risk (CAC Resp. at 10). The

[8] None of the cases cited by the CAC for the proposition that stays are disfavored when they delay compensation for sick claimants (CAC Resp. at 22-23) involved issuance of second, lower priority payments under a plan that allows such payments only when payment to higher priority claimants – who are *also* sick – is virtually guaranteed.

[9] Indeed, there is no disagreement as to the facts. Everyone agrees that the IA Report is devoid of any calculation of certainty, based wholly on assumptions and that it warns of factors that could alter its computations. The CAC's case citations are simply irrelevant. The CAC's complaint about the lack of "specific facts and affidavits" supporting the stay factors is similarly inapposite. *See* CAC Resp. at 15 n.5. In the case cited by the CAC, *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991), the Sixth Circuit considered a request to stay an order of the district court requiring defendants to allow generators of low level radioactive waste access to storage sites. The defendants asserted harm based on the onerous procedures for managing such waste and the lack of suitable storage facilities, which presumably are factual questions. Here, the harm is the decision to distribute funds to the wrong claimants in violation of the Plan. The extensive record already compiled in this matter and incorporated into the stay motion establishes the basis for the stay. *See* Movants Br. at 4 n.1; *see also* Doc. # 936-1.

Sixth Circuit adopted a term well defined in the case law. It did not do so by accident.[10]

- Although it says that the Court did not shift the burden to DCC, the CAC then cites and endorses the SPP Ruling's finding that does just that. *See* CAC Resp. at 9 ("Dow Corning did not present any alternative methodology or data that would materially alter the projections.").

- The CAC contends that the Court only relied on extrinsic evidence (an 18 year old chart) "to refute Dow Corning's argument that it would be consistent with the parties' expectations and intent to delay Premium Payments" (CAC Resp. at 12). But Dow Corning never made such an argument. The CAC's attempt to use this same chart to interpret the 'assure' standard in the prior Sixth Circuit appeal was rejected. The SPP Ruling's reliance on this same evidence to again interpret the standard is error.

IV. A Stay Serves Substantial Public Interests.

The CAC argues that delay "threatens to undermine confidence in the settlement and the judicial system." CAC Resp. at 5. Enforcing the Plan as written can hardly undermine confidence in the settlement and the judicial system. The CAC already undermined confidence in the settlement by previously convincing this Court not to stay issuance of Premium Payments pending appeal to the Sixth Circuit. The result was to allow millions of dollars to be erroneously distributed, thus creating the "horizontal inequity" cited by the CAC. As the FC recognizes, a refusal to stay the SPP Ruling will create more risk that confidence will be undermined.

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[10] The Sixth Circuit adopted DCC's virtual guarantee language based on the cases cited by DCC along with the body of law that defines the phrase to mean a near zero risk. *See* Movants Br. at 13-14.

V. A Stay is Warranted Under Rule 62(d).

Movants do not, as the CAC asserts, "recognize[] that Rule 62(d) is inapposite." CAC Resp. at 6 n.3. Movants' brief made clear that a stay is warranted under Rule 62(d) as a matter of right.[11] It is well settled that orders requiring the disbursement of funds constitute money judgments for purposes of Rule 62(d).[12]

CONCLUSION

For the foregoing reasons and those set forth in the Motion to Stay, Movants respectfully request that the Court stay its SPP Ruling pending appeal.

February 8, 2018

Respectfully submitted,

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[11] The one case that the CAC cites states that the Court "must look beyond the judgment to its practical effect." *Peacock v. Merrill*, 2010 WL 2231896, at *1 (S.D. Ala. June 2, 2010). Here the SPP Ruling will result in the payment of a minimum of multiple tens of millions out of funds contributed by Dow Corning.

[12] *See*, *e.g.*, *In re Trans World Airlines, Inc.*, 18 F.3d 208, 213-14 (3d Cir. 1994) (order requiring disbursement of funds held in registry of bankruptcy court is a money judgment); *Bellsouth Telecommunications, Inc. v. ITD Deltacom Communications, Inc.*, 190 F.R.D. 693, 694-95 (M.D. Ala. 1999) (order requiring disbursement of funds held by court is an "order to pay money").

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 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: February 8, 2018

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