Case No. 22-1753

In the United States Court of Appeals for the Sixth Circuit

IN RE: SETTLEMENT DOW CORNING TRUST

KOREAN CLAIMANTS
Interested Party – Appellant
v.
CLAIMANTS' ADVISORY COMMITTEE; DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES
Interested Parties – Appellees

FINANCE COMMITTEE
Movant – Appellee

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

JOINT RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE CLAIMANTS' ADVISORY COMMITTEE AND THE FINANCE COMMITTEE TO MOTION TO STAY

Deborah E. Greenspan
Blank Rome LLP
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 420-2200
Counsel for Dow Silicones Corporation and Debtor's Representatives

Jeffrey S. Trachtman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9175
Counsel for Claimants' Advisory Committee

Dianna Pendleton-Dominguez
Law Office
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717
Counsel for Claimants' Advisory Committee

Eugene Zilberman
Smyser Kaplan & Veselka
717 Texas Avenue
Suite 2800
Houston, TX 77002
(713) 221-2315
Counsel for the Finance Committee

Karima Maloney
Smyser Kaplan & Veselka
717 Texas Avenue
Suite 2800
Houston, TX 77002
(713) 221-2382
Counsel for the Finance Committee

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, The Debtor's Representatives
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.
The Debtor's Representatives consist of one counsel for Corning Incorporated, one in house counsel for The Dow Chemical Company and Deborah E. Greenspan.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

See separate Disclosure of Corporate Affiliations and Financial Interest filed by Dow Silicones Corporation.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Blank Rome LLP, 1825 Eye St, N.W.
Washington DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6CA-1
8/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Dow Silicones Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.

See answer to No. 2.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

Dow Silicones Corporation is owned by The Dow Chemical Company, a wholly-owned subsidiary of Dow, Inc.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Blank Rome LLP, 1825 Eye St. N.W.
Washington DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal brief, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6CA-1
6/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: Korean CL v. Dow Silicones Corp., et al.

Name of counsel: Karima G. Maloney and Eugene Zilberman

Pursuant to 6th Cir. R. 26.1, Finance Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 6, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Karima G. Maloney
717 Texas Avenue, Suite 2800
Houston, Texas 77002-2761

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6CA-1
6/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 29, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

INTRODUCTION AND BACKGROUND

Dow Silicones Corporation ("Dow Corning"),[1] the Debtor's Representatives ("DR's"), the Claimants' Advisory Committee ("CAC"), and the Finance Committee ("FC") (collectively, "Respondents") respectfully submit this joint response to the Motion to Stay filed by Korean Claimants ("Movants" or "Korean Claimants").

PRELIMINARY STATEMENT

This Motion arises out of an Order entered by the District Court on June 13, 2022, in connection with the wind-down of the 18-year distribution of funds under the terms of the Dow Corning Amended Joint Plan of Reorganization ("Plan"). *See* Closing Order 5 Notice that Certain Claims Without a Confirmed Current Address Shall be Closed and Establishing Protocols for Addressing Payments for Claimants in Bankruptcy ("Closing Order 5"), RE 1642. The Settlement Facility established in the Plan has been reviewing and paying claims since 2004. The deadline for filing claims for payment was June 3, 2019. Since that time, the Settlement Facility has been finalizing the review of claims filed at or near that filing deadline and distributing payments, including supplemental payments as authorized by the

[1] On February 1, 2018, Dow Corning Corporation changed its name to Dow Silicones Corporation. For convenience, Respondents will still refer to Dow Silicones as Dow Corning. Unless otherwise defined, capitalized terms herein have the meanings provided in the Amended Joint Plan of Reorganization, RE 1595-2 ("Plan").

District Court. The Settlement Facility will terminate, as provided in the Plan, once all timely claims have been liquidated and paid or otherwise resolved.

To assure an orderly closure of the Settlement Trust, the District Court, which retains jurisdiction over implementation of the Plan, has entered a series of "closing orders" addressing various aspects of finalizing the distribution of funds and the accounting of claims. Closing Order 5 directed the Settlement Facility to publish a list of claimants who, as of the date of Closing Order 5, had not been located after the Settlement Facility made extensive efforts – for months or years – to reach claimants to confirm a current address. The District Court requires verification of each claimant's current address to assure proper distribution of the Settlement Fund assets. The Order, entered on June 13, 2022, directed the Settlement Facility to grant an additional 90-day extension to those listed claimants during which they could provide their contact information and take actions necessary to receive payment. After that 90-day period, which will expire on September 17, 2022, the claims are to be closed. Counsel and claimants – including counsel for Korean Claimants – were notified of this 90-day period both by the standard docketing and notice procedures via the ECF system and by posting the Order and list prominently on the Settlement Facility's website. In addition, the Claimants' Advisory Committee

publicized the information on its website and in its newsletter, to which counsel for Korean Claimants subscribes.[2]

On August 25 – 73 days after Closing Order 5 was entered – Movants appealed the Order. Movants moved to stay implementation of Closing Order 5 in the District Court on August 29, 2022. Movants filed the instant Motion to Stay in this Court on September 1, 2022, only three days after filing in the District Court.

SUMMARY

The Court should deny the Motion for Stay for three reasons: *First,* both the appeal and this Motion for Stay are untimely. The notice of appeal to which this Motion to Stay relates was filed 73 days after the Order being appealed was entered – more than six weeks after the 30-day deadline for appeal. Accordingly, this Court lacks jurisdiction to address both the appeal and, concomitantly, the motion for stay pending appeal. *Second*, the District Court has not had any opportunity to address the motion for stay filed in that court a mere three days before Korean Claimants filed the Motion for Stay in this Court. Federal Rule of Appellate Procedure 8(a) requires Movants to proceed first in the District Court unless doing so would be impractical. There has been no showing of impracticability. And *third*, Movants

---

[2] Closing Order 5 was discussed in the following newsletters that are all also posted on the CAC website: June 15, 2022; June 21, 2022; July 6. 2022; August 16, 2022. *See* http://www.tortcomm.org/newsletter.shtml (last accessed on September 6, 2022).

made no showing of irreparable harm absent a stay or any of the other factors pertinent to granting a stay. In particular, the underlying dispute over claimant addresses is already the subject of another fully briefed appeal, and if the Korean Claimants prevail on that appeal, the District Court will be able to fashion adequate relief.

BRIEF BACKGROUND OF THE PLAN AND CLOSING ORDER 5

The Plan established a settlement program by which persons with Personal Injury Claims, such as Movants, could submit claim forms and supporting materials to the Settlement Facility for review and payment. *See* Plan, RE 1595-2. The Plan and certain Plan Documents – the Settlement Facility and Fund Distribution Agreement ("SFA") (RE 1595-3) and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA ("Annex A") (RE 1595-4) – specify the guidelines, criteria, and terms under which these claims are to be reviewed, evaluated, and paid. Only those submissions that meet the criteria specified in the Plan and Plan Documents may be Allowed for payment.

The Claims Administrator appointed by the District Court under the terms of the SFA oversees the operation of the Settlement Facility – the entity that receives, reviews, evaluates, and pays claims subject to the supervision of the District Court. *See* Plan § 1.29, 1595-2, Page ID #27890; SFA §§ 4.02, 5.01, 5.04, RE 1595-3, Page ID #27995-97, 28006, 28008-10. The District Court also appointed the Finance

Committee (as specified in the Plan) – which is responsible for oversight of financial matters and has specific responsibilities regarding the verification and Allowance of claim payments. *See* SFA § 4.08, RE 1595-3, Page ID #28001-28004.

The Settlement Facility, the Finance Committee, and the Claims Administrator, as well as the procedures for the distribution of funds, are supervised by the District Court. The District Court performs "all functions relating to the distribution of funds." SFA § 4.01, RE 1595-3, Page ID #27995.

Claims of Settling Personal Injury Claimants are paid from the Settlement Fund, which is a limited fund of up to $1.95 billion. *See* Plan § 5.3, RE 1595-2, Page ID #27920; SFA § 3.02(a), RE 1595-3, Page ID #27993-27994. The Settlement Fund may be used only to pay Allowed claims of Settling Personal Injury Claimants along with related administrative expenses. SFA § 3.02(a)(ii), RE 1595-3, Page ID #27994. The claim form – approved by the District Court in 2001, and which all claimants must submit – requires claimants to submit certain information in order to be eligible for payment. *See* Order Approving Claim Form Packages, RE 9; https://www.sfdct.com/_sfdct/index.cfm/disease-claim-forms/ (last accessed on September 5, 2022); https://www.sfdct.com/_sfdct/index.cfm/pom-forms/ (last accessed on September 5, 2022). That required information includes the claimant's address and contact information along with the contact information for the attorney representing the claimant. *See id.*

The Settlement Facility must assure that claims meet the necessary criteria, that the supporting documentation is reliable, and that funds are distributed only to eligible claimants. SFA §5.04(b), RE 1595-3, Page ID #28009. These requirements protect the limited Settlement Fund assets, assure the equitable treatment of claimants, and prevent incorrect or invalid distributions. When claims are prepared for payment, the Settlement Facility confirms the accuracy of the evaluation and assures that the claimant (or heirs) can be located and verified by issuing address verification letters to the claimants. *See* Declaration of Ellen Bearicks Regarding the Motion for Vacating Decision of Settlement Facility Regarding Address Update/Verification ("Bearicks Declaration"), at ¶¶26-27, RE 1595-6, Page ID # 28168-69. The Settlement Facility also issues "award" letters to claimants when a claim is approved for payment. The award letter alerts the claimant that a check will soon be sent to them directly (if they are not represented) or to their counsel. This process alerts the claimant to check with their counsel to obtain their payment. If the verification mailing to the claimant is returned as undeliverable, or does not generate a response, then the Settlement Facility will withhold payment until the claimant is located. *See* Declaration of Ann Phillips Regarding the Motion for Premium Payments to Korean Claimants, at ¶¶11-18, RE 1595-7, Page ID #28196-97.

The Plan established the CAC and the DRs to assist in the implementation of the Plan's settlement program. *See* Plan § 1.28, RE 1595-2, Page ID #27889 (CAC appointed "to represent the interests of Personal Injury Claimants after the Effective Date"); SFA §4.09, RE 1595-3, Page ID #28004. The CAC and the DRs have the authority to take action to enforce the terms of the Plan, participate in meetings of the Finance Committee, and provide advice and assistance on all matters being considered by the Finance Committee, the Settlement Facility, the Claims Administrator, and other court-appointed persons. SFA §4.09(c), RE 1595-3, Page ID #28004-28005.

The Korean Claimants are a subset of Settling Personal Injury Claimants who have submitted claims to the Settlement Facility. They, like all other such claimants, must comply with the guidelines in the Plan and the procedures established by the District Court when submitting their claims. They are required, like all other claimants, to provide the necessary supporting information that will permit review, evaluation, and payment of the claims.

The District Court has, since the Effective Date of the Plan, supervised and managed the operations of the Settlement Facility through a series of orders, including setting annual budgets, appointing personnel to perform necessary tasks under the Plan, adopting forms and informational materials for claimants,

authorizing the distribution of funds from the Settlement Fund, and providing directions regarding the Settlement Facility's operations.

The order appealed – Closing Order 5 – is one of a series of "Closing Orders" setting forth administrative guidelines to facilitate the closure of the Settlement Facility operations. Closing Order 5 was stipulated and agreed to between the CAC and the DRs, the entities with express authority granted by the Plan to interpret the terms of the Plan. *See* Closing Order 5, RE 1642 Page ID #28805. Closing Order 5 was signed by the District Court and entered on the ECF docket on June 13, 2022. Counsel for Korean Claimants receives all docket entries via the ECF system in the District Court and accordingly received notice of Closing Order 5 on June 13, 2022, when it was docketed.

Closing Order 5 explains that the District Court has entered closing orders "for the general purpose of facilitating the completion of the operations of [the Settlement Facility], accounting for all assets of the Settlement Fund, and assuring efficient final distribution of payments as specified by the [Plan]" and that the orders are "intended to maximize Settlement Fund assets for distribution to claimants and to minimize the time and cost associated with addressing payments that cannot be distributed." *Id.* at Page ID #28800-01.

Closing Order 5 directed that, "[t]o further assure an orderly closing and to preserve assets," the Settlement Facility shall post a list of claimants who had been

identified as having a "bad address" or had not responded to address verification mailings. *Id. at* Page ID #28803-04. This followed the expenditure of hundreds of hours of Settlement Facility staff time researching addresses in multiple public databases. The Order allows the listed claimants a further 90-day period, which will expire September 17, 2022, to notify the Settlement Facility of their contact information so that the Settlement Facility and the District Court can be assured that the claimants will in fact be able to receive their payments. *Id.*; *see also* https://www.sfdct.com/_sfdct/index.cfm (last accessed on September 5, 2022). Closing Order 5 provides that "[i]f a claimant responds on or before the end of that 90-day period, … the Settlement Facility will proceed to finalize processing or payment of the claim as appropriate. If the claimant does not respond on or before the end of the 90-day period, the claim shall be permanently closed." *Id.*

Movants contend that the Settlement Facility should not require current address information from claimants. In a separate appeal currently pending in this Court, Movants have disputed the same requirement set forth in Closing Order 2 entered March 19, 2019 – that the Settlement Facility obtain a current address for claimants before issuing payments.[3] Closing Order 2 cites the need to prevent the significant time and expense incurred by the Settlement Facility (and thus by Dow

[3] *See Korean Claimants v. Claimants' Advisory Committee, et al.*, No. 21-2665 ("Korean Claimants 2021 Appeal").

Silicones) in researching claimant status and potential addresses and remailing correspondence that is returned undeliverable. Closing Order 2, RE 1482, Page ID # 24088-89. The address verification requirement is simple and is not burdensome: claimants need only contact the Settlement Facility—either by telephone, email, or mail—and provide their current address.[4]

ARGUMENT

A. The Motion To Stay Pending Appeal Is Barred Because It Is Not Timely.

The Korean Claimants filed their appeal to which this Motion for Stay pertains long after the 30-day deadline for filing a notice of appeal. A motion for stay pending appeal cannot be timely if the appeal to which it pertains is untimely.

The appellate court does not have jurisdiction over the appeal if the notice was not timely filed. Section 2107(a) of Title 28 of the U.S. Code provides:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

This statutory provision precludes jurisdiction. *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 20 (2017) ("If a time prescription

---

[4] The District Court imposed similar address verification procedures in connection with closing Class 7 claims, without controversy. *See* Consent Order to Establish Guidelines for the Distributions of Class 7 Silicone Materials Claimants' Fund (dated Dec. 3, 2015) (RE 1227, Page ID # 18479, 18493-96), approved Dec 3, 2015 (RE 1226, Page ID # 18473). This procedure was noted as well in Closing Order 3, RE 1598, Page ID # 28285-88.

governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional"); *Gunter v. Bemis Company, Inc.*, 906 F.3d 484, 493 (6th Cir. 2018) (28 U.S.C. § 2107(a) "clearly sets a jurisdictional deadline with respect to a notice of appeal"). Rule 4 similarly provides: "In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A).[5]

Movants' failure to file timely is conclusive: the Motion to Stay must be denied and the appeal should be dismissed for the simple and controlling reason that this Court lacks jurisdiction.[6]

Counsel for Movants asserts that he did not receive notice of the Order until August 19, 2022. Motion to Stay at 2. But Closing Order 5 was entered on the

---

[5] The District Court has limited authority in some circumstances not applicable here to grant an extension. *See* 28 U.S.C. §2017(c) (providing that district court "may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."); *id* (upon finding that party did not receive notice and that no party would be prejudiced, district court may reopen time for appeal upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier). No such extension has been requested or granted here.

[6] For this reason, the Respondents will seek to dismiss the appeal of Closing Order 5.

District Court docket on June 13, 2022, *see* RE 1642, and was thus served on all counsel of record via the ECF system. *Cf.* Fed. R. Civ. P. 5(b)(2)(E) (a paper is served under this Rule by sending it to a registered user by filing it with the court's electronic-filing system); United States District Court for the Eastern District of Michigan's Electronic Filing Policies and Procedures (revised September 2022), R.9(b), ("[w]henever a non-restricted paper is filed electronically in accordance with these procedures, ECF will generate a NEF [Notice of Electronic Filing] to all filing users associated with that case and to the judge to whom the case is assigned."). Counsel for Korean Claimants is listed as counsel of record for Korean Claimants on the ECF system (*see* https://ecf.mied.uscourts.gov/cgi-bin/qryAttorneys.pl?17810) (last accessed on September 5, 2022).

Accordingly, counsel received notice on June 13, 2022. Even if counsel was not aware of this notice, the time for seeking an extension of the time to appeal under Section 2017(c) has expired. *See* 28 U.S.C. §2017(c); Fed. R. App. P. 4(a)(5)(A); Fed. R. App. P. 4(a)(6). *Cf. Dilloway v. Comm'r of Soc. Sec.*, No. 18-13424, 2020 WL 3440578, at *1 (E.D. Mich. May 11, 2020) (holding that "counsel's purported unawareness" that a report and recommendation had been issued does not constitute excusable neglect where nothing in court docket indicated counsel failed to receive the usual notice sent electronically to e-mail address on file). Accordingly, both the appeal and this Motion to Stay are barred as untimely.

B. The Motion to Stay Should be Denied Pending Action by the District Court

The Motion should be denied and dismissed for a second reason. Rule 8(a)(1) provides that a party "must ordinarily move first in the district court" for a stay of an order of a district court pending appeal, and section 8(a)(2) states that a motion for a stay made to the court of appeals must:

> (i) show that moving first in the district court would be impracticable; or
> (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

Fed. R. App. P 8(a)(2)(A). The Korean Claimants moved in the District Court for a stay three days before filing the Motion to Stay in this Court but now argue that such motion would be "impracticable." This bald assertion is based on nothing more than speculation that the District Court would deny the motion and would not do so promptly. Such speculation is not a sufficient basis to override the clear procedural rule. *See In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982) (finding that it "is not an adequate reason for noncompliance with Rule 8" to argue that it would be "in vain" to first seek suspension of injunction in district court because of action taken by district court in another matter). Seeking such relief in the district court before moving for an injunction in the court of appeals is "'[t]he cardinal principle of stay applications.'" *Baker v. Adams County/Ohio Valley School Bd.*, 310 F.3d 927, 930

(6th Cir. 2002) (*per curiam*) (citation omitted). That principle should be enforced here.

C. Movants Cannot Satisfy Any Of The Factors That Govern A Stay.

Even if the Court were to reach the merits of the Motion, the Korean Claimants fail to establish any basis for a stay. In determining whether a stay should be granted, this Court considers "the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These four factors are: "(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." *DV Diamond Club of Flint, LLC v. Small Business Admin.*, 960 F.3d 743, 746 (6th Cir. 2020) (quoting *Griepentrog*, 945 F.2d at 153.). The party seeking the stay must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted. *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (citing *In re DeLorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985)).

The Korean Claimants must articulate the specific reasons why the Order at issue is likely to be reversed. *See Detroit Free Press, Inc v. Ashcroft,* No. 02-1437,

2002 WL 1332836, at *1 (6th Cir. Apr. 18, 2002) ("a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal") (citing *Griepentrog*, 945 F.2d at 153). The Korean Claimants have not done so.

1. Korean Claimants Are Not Likely to Succeed on Appeal.

The Korean Claimants are not likely to succeed on their appeal of Closing Order 5. First, as noted above, the appeal was not filed timely and, on that basis alone, should be dismissed. Second, the Korean Claimants are not likely to prevail on the merits of the appeal of Closing Order 5: Closing Order 5 is a valid order properly entered by the District Court and stipulated to by the parties; the District Court has the authority and the obligation to adopt procedures that will fully implement the terms of the Plan and to specify the administrative mechanisms to achieve the purposes of the Plan; the District Court has the authority and obligation to facilitate the timely and orderly termination of the Plan operations – to avoid undue cost and delay and to provide finality; and Closing Order 5 is an appropriate and necessary mechanism to fulfill the District Court's obligations under the Plan, and implements, is consistent with, and does not modify or violate the Plan or the Bankruptcy Code.

The Korean Claimants appear to argue that Closing Order 5 was "premature" because of the pendency of their 2021 Appeal, which challenges the District Court's application of a different order – Closing Order 2 – to require Korean Claimants to

provide current address information. But Closing Order 5 applies to all claimants whose current contact information is not known (not just Korean Claimants), and it does not address the details of the mechanism by which the Settlement Facility must verify address information – which is a primary issue raised by Korean Claimants in their challenge to Closing Order 2. It merely identifies claims that have not responded to address verification requests and provides an administrative process to finalize those claims. *Compare* Korean Claimants 2021 Appeal, Case No. 21-2665, Doc. Nos. 23, 24 and 25 (Appellees' briefs).

2. There is No Irreparable Harm to Korean Claimants.

To support a stay pending appeal, the Movant must show irreparable harm. *See State of Ohio v. Becerra*, No. 21-4235, 2022 WL 413680, at *2 (6th Cir. Feb. 8, 2022) ("[E]ven the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.") (quoting *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020), quoting D.*T. v. Sumner Cnty. Schools*, 942 F.3d 324, 326–27 (6th Cir. 2019)). That injury "'must be both certain and immediate,' not 'speculative or theoretical.'" *D.T.*, 942 F.3d at 927 (quoting *Griepentrog*, 945 F.2d at 154). Additionally, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of

irreparable harm." *Becerra,* 2022 WL 413680, at *2 (quoting *Griepentrog*, 945 F.2d at 154, quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

The Korean Claimants assert that Closing Order 5 "excludes the Claims of one thousand four hundred (1,400) Korean Claimants from processing of the SF-DCT permanently" and that they "will be completely denied any rights of compensation by the SF-DCT if Closing Order 5 is not stayed by September 17, 2022". Motion to Stay at 6-7. These assertions do not support the conclusion that Korean Claimants "will be irreparably harmed absent a stay." *Id.* at 12.

Like all other claimants, the Korean Claimants need only provide their current addresses to the Settlement Facility by September 17 to comply with Closing Order 5. They can provide the information by telephone call, email, or written correspondence. This is hardly an insurmountable burden or impossible task. The Korean Claimants do not argue that this task is difficult. Instead, counsel for the Korean Claimants contends his clients do not *want* to verify and update their contact information. *See* Korean Claimants' 2021 Appeal, No. 21-2665, Appellants' Brief, Doc. 21-1, at 11-12, 21. This assertion is belied by the fact that many Korean Claimants have already provided their current contact information and have thus complied with Closing Order 5. *See* Exhibit 1, Declaration of Kimberly Smith-Mair ("Smith-Mair Dec."), at ¶8.

It is important to clarify that despite the implication raised in Korean Claimants' motion, the Settlement Facility is not terminating on September 17. The District Court has not entered a termination order and there are many claims still pending that have not yet been finalized. *See* Closing Order 5, RE 1642. The Settlement Facility will continue operations until it completes the resolution of all pending claims (including claims subject to probate, claims on appeal, and claims that continue to cure deficiencies) and will at that point terminate as provided in the Plan. This point is not expected to be reached until late 2023 or early 2024. *See* Exhibit 1, Smith-Mair Declaration at ¶10.[7]

Accordingly, because the Korean Claimants may seek relief at a later date, they will not suffer irreparable harm without a stay.

3. Issuance of a Stay Would Cause Harm and Delay to the SF-DCT, Other Claimants and Dow Silicones.

The Korean Claimants assert that "other Claimants will not be harmed" by the issuance of a stay "because they have been processed and paid or will be paid in full even if this Court grants the stay." Motion to Stay at 7. Issuance of a stay, however,

---

[7] The Settlement Facility continues to be funded with payments from Dow Corning. *See* Funding Payment Agreement, at Art. 2, RE 1592-12 at Page ID # 27755-64. As Closing Order 5 notes, the vast bulk of the remaining claims have been processed and paid. *See* Closing Order 5, RE 1642. This Court previously confirmed that the funding cap is sufficient to address all remaining claims, including those identified in Closing Order 5 – should they be located with a verified address. *See In re Settlement Facility Dow Corning Trust*, 754 Fed. Appx. 409 (6th Cir. Dec. 13, 2018).

would disrupt the administration and wind down of the Settlement Facility, resulting in delays, and would necessarily impose significant costs on the Settlement Facility and, in turn, Dow Silicones. (It appears that the Korean Claimants seek a stay of Closing Order 5 only as to themselves but that is not entirely clear.) Even a partial stay of Closing Order 5 would put the Settlement Facility in a state of indefinite limbo and require it to maintain staff and incur excess costs. The Plan does not operate in perpetuity. It is now more than three years past the claim filing deadline. The fact that the Korean Claimants do not wish to comply with court orders[8] cannot be a basis for preventing the Settlement Facility from undertaking the administrative mechanisms to identify and close dormant claims and claims that cannot be paid so that it can properly account for the resolution of each claim as contemplated by the Plan.

[8] The Settlement Facility found that prior address updates provided by counsel for Korean Claimants were not accurate. *See* Bearicks Declaration, at ¶34, RE 1595-6, Page ID # 28169.

4. A Stay Would Not Serve the Public Interest.

The Korean Claimants assert that the public interest will be served by a stay because the Plan does not specify a requirement to maintain current address information. Motion to Stay at 7. But the Plan does not purport to, and indeed cannot, define the detailed administrative operational procedures necessary to implement its terms. In fact, to the contrary, the Plan clearly instructs the Claims Administrator, under the supervision of the District Court, to develop and define necessary detailed procedures. *See* SFA § 5.01(a), RE 1595-3, Page ID #28006 ("The Claims Administrator shall have discretion to implement such additional procedures and routines as necessary to implement the Claims Resolution Procedures …."); SFA § 5.01(b), RE 1595-3, Page ID #28006 ("The Claims Administrator shall institute procedures … and shall develop claims-tracking and payment systems as necessary to process the Settling Breast Implant Claims in accordance with the terms of this Settlement Facility Agreement …."); SFA § 5.04(b), RE 1595-3, Page ID #28009 ("The Claims Administrator shall have the plenary authority and obligation to institute procedures to assure an acceptable level of reliability and quality control of Claims and to assure that payment is distributed only for Claims that satisfy the Claims Resolution Procedures.").

The District Court deemed the address verification requirement to be necessary to assure that funds will be received by the eligible claimant – consistent

with the Plan and with the public interest. The fact that the Plan does not expressly set forth these detailed instructions is not a basis for finding that a stay would serve the public interest.

This factor weighs strongly against a stay.[9]

CONCLUSION

The Respondents respectfully request that the Court deny the Motion for Stay.

Dated: September 6, 2022

Respectfully submitted,

/s/ Deborah E. Greenspan

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

[9] A stay will prolong the Settlement Facility operations and result in the expenditure of significantly greater administrative costs which will then be paid by Dow Corning. *See* Fed. R. App. P. 8(a)(2)(E) ("The court may condition relief on a party's filing a bond or other security in the district court."). The Settlement Facility's monthly administrative costs for staff and necessary expenses are approximately $460,000. *See* Exhibit 1, Smith-Mair Declaration, at ¶11. As the funding source, Dow Corning submits that it would be appropriate to consider a bond in the amount of one month of administrative costs as a minimum, reasonable requirement.[9] The Respondents have not previously moved for costs in connection with the multiple appeals filed by Korean Claimants but may consider doing so in connection with this appeal. *See* Fed. R. App. P. 39.

/s/ Dianna Pendleton-Dominguez
Dianna Pendleton-Dominguez
Law Office
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717
dpend440@aol.com
Counsel for Claimants' Advisory Committee

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9175
JTrachtman@kramerlevin.com
Counsel for Claimants' Advisory Committee

/s/ Karima Maloney
Karima Maloney
Smyser Kaplan & Veselka
717 Texas Avenue
Suite 2800
Houston, TX 77002
(713) 221-2382
kmaloney@skv.com
Counsel for the Finance Committee

/s/ Eugene Zilberman
Eugene Zilberman
Smyser Kaplan & Veselka
717 Texas Avenue
Suite 2800
Houston, TX 77002
(713) 221-2315
ezilberman@skv.com
Counsel for the Finance Committee

STATEMENT OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing program used to prepare this brief (Microsoft Word) and excluding the parts of this brief exempted by Fed. R. App. P. 32(f), this brief contains 5,052 words.

Dated: September 6, 2022

/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
Deborah.Greenspan@blankrome.com

Debtor's Representative and
Attorney for Dow Silicones Corporation

CERTIFICATE OF SERVICE

I certify that on September 6, 2022, I electronically filed a copy of the foregoing Response of Appellees the Debtor's Representatives, Dow Silicones Corporation, Finance Committee and Claimants' Advisory Committee through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case, as follows:

Karima Maloney
Eugene Zilberman
Smyser, Kaplan & Veselka
717 Texas Avenue, Suite 2800
Houston, TX 77002
Counsel for the Finance Committee

Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of the Americas
New York, NY 10036

Ernest H. Hornsby
FarmerPrice
100 Adris Place
Dothan, AL 36302

Dianna Pendleton-Dominguez
401 N. Main Street
St. Marys, OH 45885
Counsel for the Claimants' Advisory Committee

Yeon-Ho Kim
Yeon-Ho Kim Int'l Law Office
159 Samsung-dong. Kangnam-ku
Suite 4105 World Trade Center Building
Seoul, 00125-0729, South Korea
Counsel for the Korean Claimants

Dated: September 6, 2022

/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
deborah.greenspan@blankrome.com

Debtor's Representative and
Attorney for Dow Silicones Corporation