

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 31, 2014

Ms. Deborah E. Greenspan
Dickstein Shapiro
1825 Eye Street, NW
Washington, DC 20006

Re: Case No. 14-1090, *In re: Settlement Facility Dow*
Originating Case No. : 2:00-mc-00005

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Bryant L. Crutcher
Case Manager
Direct Dial No. 513-564-7013

cc: Mr. John Donley
Mr. Kyle R. Dufrane
Mr. Ernest H. Hornsby
Mr. Timothy J. Jordan
Ms. Dianna Pendleton-Dominguez
Mr. Douglas Geoffrey Smith
Mr. James L. Stengel
Mr. David Henry Tennant
Mr. Jeffrey S. Trachtman
Mr. David J. Weaver
Ms. Laurie Strauch Weiss

Enclosure

No. 14-1090

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.)

FILED
Mar 31, 2014
DEBORAH S. HUNT, Clerk

ORDER

Before: COOK and McKEAGUE, Circuit Judges; HOOD, District Judge.*

In this case arising from its Chapter 11 bankruptcy, Dow Corning Corporation, the debtor’s representatives, the Dow Chemical Company, and Corning Incorporated (collectively, “Dow”) appeal a district court’s order authorizing partial Premium Payments to certain Second Priority claimants under the Amended Joint Plan of Reorganization approving the settlement of products liability claims arising from its manufacture of silicon breast implants. Dow moves to stay the district court’s order. The Finance Committee—charged with distributing settlement

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

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funds—and the Claimants’ Advisory Committee oppose a stay, and Dow replies. Additionally, Dow moves to seal certain materials it filed in support of its motion to stay.

The party requesting a stay bears the burden of showing that the circumstances justify the stay. *Serv. Emps. Int’l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (citing *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002)). We consider four factors to determine whether a stay is appropriate: (1) the likelihood that the movant will prevail on the merits of the appeal; (2) whether the movant will be irreparably injured absent a stay; (3) whether issuance of a stay will injure other interested parties; and (4) where the public interest lies. *Id.* (quoting *Mich. Coal. Of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). “These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” *Id.*

Dow asserts that it has a likelihood of success on appeal because the appeal raises complex, difficult issues that have been heavily contested. Although Dow asserts that the district court’s order is erroneous on multiple bases, it does not cite to any authority supporting its position. “[A] movant seeking a stay pending review on the merits of a district court’s judgment will have greater difficulty in demonstrating a likelihood of success on the merits.” *Griepentrog*, 945 F.2d at 153. Moreover, a movant must “demonstrate more than the mere ‘possibility’ of success on the merits.” *Id.* (quoting *Mason Cnty. Med. Ass’n v. Knebel*, 563 F.2d 256, 261 n.4 (6th Cir. 1977)). The district court’s order interprets the bankruptcy plan, and “[i]n interpreting a confirmed plan, courts use contract principles.” *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 772 (6th Cir. 2010) (quoting *In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006)). Dow’s issues concern contract interpretation, and we review the

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district court's interpretation of this particular plan deferentially. *See id.* Under this deferential standard, Dow has not demonstrated a likelihood of success on appeal.

The second factor concerns whether the movant will be irreparably injured absent a stay. Dow asserts that it will suffer immediate and irreparable harm because more than \$100 million in irrevocable payments will be made that cannot be recovered if the ruling is later reversed. In evaluating the harm, we consider 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 (citing *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987)). “Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Id.* Additionally, the alleged harm “must be both certain and immediate, rather than speculative or theoretical.” *Id.* (citing *Wis. Gas Co. v. Fed. Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The harm asserted by Dow is primarily monetary harm, and it is merely speculative that the harm will occur.

The third factor concerns the harm to other interested parties. Dow asserts that no other interested parties will be harmed by a stay because the disbursement of funds will only be held for the duration of the appeal, and the claimants have no expectation of disbursement at a specific time. But Dow is obligated to make the First Priority Payments, and the Premium Payments to the extent the funds are present, under the Settlement Facility. The claimants for Premium Payments have already waited several years for disbursement. While this may not constitute a significant harm, the longer they wait for payments, the greater the harm.

The final factor concerns the public interest. Dow asserts that this factor weighs in its favor because the public interest favors preserving assets so that all eligible claimants will

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receive their just compensation, and the absence of a stay may impair its ability to fully compensate all claimants. Dow may be correct. But even if this factor weighs in its favor, it is insufficient, standing alone, to warrant a stay.

Dow also moves to file under seal certain materials that it has provided the court in support of its motion to stay. Dow contends that these documents are deemed confidential by the Plan and contain protected privacy interests that would be prejudiced if not filed under seal.

Documents filed in this court generally must be made available to the public. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). But “[d]ocuments sealed in the lower court . . . must continue to be filed under seal in this court.” 6th Cir. R. 25(h)(5). Similar documents were filed under seal in the district court, and the district court is more familiar with the Plan in this case and the confidentiality requirements.

The motion to stay is **DENIED**. The motion to seal is **GRANTED**.

ENTERED BY ORDER OF THE COURT



Clerk