UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Settlement Facility Dow Corning Trust

Case No. 00-00005
Honorable Denise Page Hood

_____/

DOW CORNING'S REPLY IN SUPPORT OF MOTION TO STAY THE COURT'S RULINGS

Dow Corning agrees with the CAC's proposed conditions for a stay. (Resp. at 8.) Dow Corning agrees that the Claims Administrator may process (but not pay) claims affected by the Rulings. Likewise, it would not object if the CAC files a motion to expedite the appeals. Dow Corning believes that such conditions obviate any objection to the stay. To the extent the Court disagrees, however, Dow Corning responds as follows to the CAC's opposition.

The CAC fails to address the central issue raised in Dow Corning's motion as well as the binding Sixth Circuit precedent compelling a stay. This is not a case in which Dow Corning faces a mere "monetary harm." (*See* Resp. at 4.) Rather, as in the Sixth Circuit decisions in *Chambers* and *Stephens*, absent a stay, Dow Corning faces an *irreparable* harm – the impossible task of attempting to recover payments from thousands of individual claimants scattered across the country. The CAC does not dispute that the recovery of such sums once paid is simply not feasible. Nor does it address, much less attempt to distinguish the holdings of the Sixth Circuit in *Chambers* and *Stephens* requiring entry of a stay under such circumstances. The irreparable harm to Dow Corning alone warrants a stay under this settled Sixth Circuit law.

Instead, the CAC attempts to trivialize the harm to the majority of claimants who do *not* benefit from the Rulings, and who may actually receive *decreased* payments as a result of the Rulings. (Resp. at 1.) However, the irreparable harm such claimants will suffer is in fact

documented in the affidavit of Deborah Greenspan that accompanies Dow Corning's motion, which demonstrates that implementation of the Rulings threatens funds available to make Premium Payments and future Base Payments. The CAC has submitted no contrary evidence, and indeed concedes that the Rulings will result in an additional $50-60 million in payments that will deplete funds available to compensate all claimants – a figure that undoubtedly understates the true amount, particularly since it is not supported by any actual evidence and does not include future claimants. Accordingly, a stay is necessary to prevent irreparable harm to both Dow Corning *and* the majority of claimants. This irreparable harm vastly outweighs the alleged harm to the minority of claimants who benefit from the Rulings, who in most cases have already received payments from the Trust and are merely seeking additional sums – which they are assured to recover if the appeals fail.

First, the appeals raise serious questions that warrant a stay. Contrary to the CAC's suggestion, Dow Corning need not demonstrate a "high probability of success on the merits." *Michigan Coal. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991). Rather, a stay is warranted whenever an appeal raises "serious questions." *Historic Pres. Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). Nor is such a showing a "threshold" requirement for a stay (Resp. at 2), but rather as the CAC acknowledges elsewhere (*id.*), merely one of several "considerations that must be balanced together." *Griepentrog*, 945 F.2d at 153. This factor strongly supports a stay here given that, for example, the court's ruling on the Disability Level A Issue conflicts with Judge Pointer's ruling in the MDL case. (*See* DCC Mem. at 3-4.) The CAC simply ignores this conflict and, worse, misstates the test on appeal as "clearly erroneous." (Resp. at 3.) The June 10, 2004 stipulation does not and cannot establish such a standard of review. Rather, the stipulation simply states that the "clearly erroneous" standard will apply to the "extent

permissible" to appellate review of "findings," not to the Court's *legal* conclusions. (Stip. § 2.01(d)(5).) Sixth Circuit law is clear that "the parties may not stipulate to the standard of review," *Regional Air. Auth. of Louisville v. LFG*, 460 F.3d 697, 712 n.10 (6th Cir. 2006), and indeed, Sec. 2.01(d)(5) of the stipulation states that "[n]othing in these procedures shall affect the appellate rights of the parties."

Second, the CAC does not rebut Dow Corning's showing of irreparable harm to Dow Corning in the absence of a stay. The CAC does not dispute that sums paid out to claimants may never be recovered because many claimants will have already spent the money. (DCC Mem. at 4-5; Greenspan Aff. ¶¶ 21-25.) Nor does it dispute that each such dollar paid is a dollar out of Dow Corning's pocket. (Greenspan Aff. ¶ 14.) And the CAC fails to even discuss the Sixth Circuit's rulings in *Chambers* and *Stephens* demonstrating that a stay is plainly warranted based on this factor alone. *See* DCC Mem. at 4-5. *See also, e.g.*, *Savoie v. Merchants Bank*, 84 F.3d 52, 58 (2d Cir. 1996) (holding that "recovery from each of the hundreds of trust customers who received part of the $9 million payment" constitute irreparable harm because it would be "so impractical as to be infeasible"); *Matter of Hawaii Corp.*, 796 F.2d 1139, 1143 (9th Cir. 1986) (permitting interlocutory appeal of distribution order because of "manifest" problems with forcing shareholder "to recover his pro rata share of the shareholder distribution from thousands of shareholders").[1]

[1] The CAC's authorities involve *reparable* economic injuries that may be compensated in the event of a successful appeal. (*See* Resp. at 4.) For example, the court in *S&M Brands, Inc. v. Summers*, 2006 WL 1804606, at *3 (M.D. Tenn. June 28, 2006) found that there was no risk of irreparable harm because "the amount of funds in question [was] relatively small, less than $31,000," and "the funds at issue [were] held in an escrow account" (*id.*), just as the funds are held in trust here. The CAC's attempt to distinguish *In re Diet Drugs*, 236 F. Supp. 2d 445 (E.D. Pa. 2002) and *Tri-State Generation*, 805 F.2d 351 (10th Cir. 1986) likewise fails. (*See* Resp. at 4.) *Tri-State* is directly on point because Dow Corning would be "trying to collect a damage judgment" if it were forced to pursue claims against individual claimants to recover overpayments. *Diet Drugs* cannot be distinguished on the ground that it involved "invalid" claims, given that claim validity is the very issue the Sixth Circuit will decide here.

Third, claimants face no irreparable harm if a stay is granted. The CAC does not dispute that the funds it seeks will be preserved in the Trust pending the outcome of the appeal, and indeed concedes that a stay will simply "preserve the status quo." *See* Resp. at 6; *Simmons v. Stephen*, 2009 WL 1013497, at *1 (W.D. Mich. Apr. 15, 2009). (*See* DCC Mem. at 6.) Nor does it dispute that immediate implementation of the Rulings will benefit only a minority of claimants, who will profit at the expense of the *majority* of claimants who want and expect Premium Payments. (*See* DCC Mem. at 7; Greenspan Aff. ¶ 28.) Rather, the only harm it maintains claimants will suffer is from the delay in receiving payment in the event they prevail on appeal. But, the cases cited by the CAC find that such a temporary delay is not irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (federal employee's "*temporary* loss of income, *ultimately to be recovered*, does not usually constitute irreparable injury" (emphasis added)). Such harm pales in comparison with the *irreparable* harm imposed, in the absence of a stay, on Dow Corning, the majority of claimants, or both.[2] Indeed, while the CAC now asserts that the minimal delay pending appeal is "significant" (Resp. at 2) and "unfair" (*id.* at 6), it never sought to expedite these motions, which have been pending for over five years. Nor does the CAC dispute that the vast majority of the claimants who would benefit under the Rulings *have already received payments* – the only issue in dispute is whether they will receive *additional amounts*. (Greenspan Aff. ¶¶ 10, 16.) Waiting for this additional payment during the relatively

[2] Thus, this case is distinguishable from the other cases the CAC cites. (Resp. at 7.) For example, in *Reaves ex rel. GTI Capital Holdings, LLC v. Comerica Bank-CA*, 2008 WL 961112, at *6, *10 (Bankr. D. Ariz. April 4, 2008) the court denied a stay because the movant failed to "even address any of the elements necessary to prevail on a such a Motion," and in particular there was "no indication of any irreparable injury or even a discussion of the issue." Likewise, in *Arnold v. Garlock, Inc.*, 278 F.3d 426, 433 (5th Cir. 2001), the court denied a stay pending appeal because the movant was essentially seeking to appeal "an unappealable remand order." Finally, in *In re W.R. Grace & Co.*, 2008 WL 5978951 (D. Del. Oct. 28, 2008), the court refused to stay an order on jurisdictional grounds, including that it lacked bankruptcy jurisdiction to stay pending litigation between two sets of non-debtors.

brief appellate period is of limited harm, especially when Dow Corning has acted expeditiously on this matter, seeking at the earliest opportunity to maintain claims office guidelines that Dow Corning believes to be correct.[3] And, there is no danger that claimants will be unable to locate medical records while an appeal is pending (Resp. at 6) because most records have already been submitted, and if not, claimants may do so immediately.

Finally, the CAC's assertion that the majority of claimants will not be harmed in the absence of a stay is refuted by the claims information in the Greenspan affidavit and by common sense. The CAC concedes that increased payments may amount to $50-60 million, a figure that is not supported by any evidence and which undoubtedly will be much higher, particularly since it does not include future claimants. In addition, the CAC concedes that the fund is capped at $1.935 billion and that Premium Payments will be denied if Base Payments come within $200 million of that cap. (Resp. at 5; Greenspan Aff. ¶¶ 7, 28-29.) Accordingly, even under the CAC's numbers, there is a real and substantial threat that payments will be reduced or denied. The CAC's reference to $460 million in current Trust funds (Resp. at 5) does not mitigate this risk because that money must be used to pay *current claims*, which are running behind pre-funded amounts in the Trust. The risk will only grow over time as the Rulings affect future claims that have not yet been filed and may well generate additional filings over the next ten years. (Greenspan Aff. ¶¶ 11, 20, 29.) The CAC's speculation that there will be a "rapidly

[3] Moreover, in contrast to the *W.R. Grace* asbestos case cited by the CAC involving dying plaintiffs, this is an appeal that involves a contractual settlement of highly disputed personal-injury claims where there was no finding below as to the merits and, in fact, the consensus science, regulatory determinations and *Daubert* practice now reject the hypothesis that silicone implants cause disease. The prestigious Institute of Medicine concluded that there is "no elevated risk or odds ratio for an association of implants with disease." (IOM Report at ES-7, Ex. A.) The FDA likewise ruled that "no cause and effect relationship has been established between breast implants and these conditions." (FDA Notice at 3, Ex. B.) *See also, e.g., Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 992 (D. Ariz. 2000) (noting "overwhelming evidence" showing breast implants do not cause disease).

dwindling pool of new claims" (Resp. at 5) is unsupported and thus provides no basis for opposing the stay.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **June 19, 2009**July 10, 2009, 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 counsel of record.

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