

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

IN RE URETHANE ANTITRUST LITIGATION)
_____)
THIS DOCUMENT RELATES TO:)
POLYETHER POLYOL CASES)
_____)

Case No. 04-md-1616-JWL-JPO

**THE DOW CHEMICAL COMPANY’S
MOTION TO STAY EXECUTION ON THE JUDGMENT PENDING APPEAL
AND SUPPORTING MEMORANDUM**

The Dow Chemical Company intends to appeal the judgment entered in this case on May 15, 2013. Dow moves the Court to stay any execution on the judgment until completion of the appellate review process before the Tenth Circuit, and if necessary the Supreme Court. In light of Dow’s financial position, the plaintiffs are assured payment on the judgment if Dow does not prevail on appeal. As a result, Dow asks the Court to enter the stay without requiring Dow to post a supersedeas bond.¹

On February 20, 2013, the jury returned a verdict in this case. Verdict Form (Dkt. 2799). On May 15, 2013, the Court denied Dow’s motion to decertify and Dow’s post-trial motions. Memorandum and Order (Dkt. 2879). Pursuant to the jury’s verdict and its May 15 Order, the Court then entered judgment against Dow and “in favor of the plaintiff class.” Judgment in a

¹ Dow has contacted counsel for plaintiffs about this request. They are considering whether to consent to it and will communicate their decision to Dow’s counsel and the Court no later than the deadline for responding to this motion.

Civil Case (Dkt. 2880). After trebling the amount set out on the verdict form, the judgment totaled \$1,200,147,117.² *Id.*

If this judgment were affirmed on appeal, Dow has the ability to pay it. Dow is one of the largest global chemical companies with annual sales of more than \$56 billion and cash flow from operating activities in excess of \$4 billion in 2012. Declaration of William H. Weideman (Ex. 1) at ¶ 3. As is reflected in its 2012 Annual Report,³ Dow has a strong liquidity position and sufficient financial flexibility to pay the judgment amount promptly. As of December 31, 2012, Dow had more than \$9 billion in aggregate of readily available liquidity to cover on short notice not only the judgment amount but much larger amounts as necessary. Weideman Dec. at ¶ 3. This is comprised of cash and cash equivalents of \$4.3 billion on its balance sheet and access to committed and available facilities with various U.S. and foreign banks for an amount in excess of \$5.0 billion. *Id.* Dow thus has the ability to pay the judgment should its appeal be unsuccessful.

Dow's current credit ratings are at a solid investment grade level (Baa2 by Moody's, BBB by S&P and BBB by Fitch). *Id.* at ¶ 4. As demonstrated by several successful debt capital market transactions that Dow has recently completed, Dow has a proven track record and capacity to access debt capital markets globally to support any on-going financial needs and requirements. *Id.*

² The judgment amount does not factor in the settlements by the other defendants. Dow anticipates filing a motion to amend the judgment asking the Court, among other things, to reduce the judgment by the settlement amounts. Plaintiffs have filed a motion seeking the same amendment.

³ The Court may obtain a true and accurate copy of Dow's 2012 Annual Report filed with the United States Securities and Exchange Commission at: www.dow.com/investors/pdfs/161-00784_2012_Annual_Report.pdf.

Dow therefore asks the Court to stay any execution on the judgment without requiring Dow to post a supersedeas bond. While an approved supersedeas bond stays execution, Fed. R. Civ. P. 62(d), a district court may use its discretionary authority to stay execution without a bond. *Dutton v. Johnston County Bd. of County Comm'rs*, 884 F. Supp. 431, 435 (D. Kan. 1995) (Lungstrum, J.) (staying execution of judgment without a bond after considering the factors stated in *Dillon v. City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1988)); see *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-1468, 2009 Lexis 27768, at *1 (D. Kan. Apr. 1, 2009) (Lungstrum, J.) (staying execution of judgment without a bond). That would be appropriate here.

When deciding whether to require a bond, a district court may consider: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment if it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *Dutton*, 884 F. Supp. at 435 (quoting *Dillon*, 886 F.2d at 904-05). These considerations support Dow's request.

As shown above, Dow without question has the financial wherewithal to pay the judgment.⁴ Stated in the language of the *Dillon* court, Dow's "ability to pay the judgment is so

⁴ As a result, the fifth *Dillon* consideration, whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position, is not applicable to Dow, and thus is not relevant here.

plain that the cost of a bond would be a waste of money.”⁵ 886 F.2d at 905. Dow’s recent and long term performance as reflected in its annual report should give the Court the utmost confidence in the availability of funds to pay the judgment. As a result, the third and fourth *Dillon* factors support Dow’s motion. Moreover, Dow’s financial position has a basic, practical importance. The fundamental purpose of posting a supersedeas bond is “to insure that the judgment creditor is secured from losses which may result from a stay.” *Dutton*, 884 F. Supp. at 435. Here, Dow’s financial strength provides that assurance.

The first and second *Dillon* factors also support Dow’s request. The “collection process” is not complex. It involves only one potential obligor, Dow, and Dow has the ability to satisfy the judgment. And, if the judgment is affirmed after all of Dow’s opportunities for review by higher courts have been exhausted, Dow will pay the judgment by wire transfer or check within 30 days. *Weideman Dec.* at ¶ 6. In short, Dow has the ability to pay the judgment and to do so in a timely manner.

For all these reasons, Dow asks the Court to grant this motion and stay execution on the judgment without requiring Dow to post a supersedeas bond.

⁵ *See also* Fed. R. App. P. 39(e)(3) (if the judgment is reversed, costs are taxed against the appellee, and such costs include “premiums paid for a supercedeas bond or other bond to preserve rights pending appeal”). The cost of a bond in this case for the current judgment amount would be approximately \$4.5 to \$5 million per year. *Weideman Dec.* at ¶ 6.

Respectfully submitted,

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OF COUNSEL FOR THE DOW CHEMICAL COMPANY

Certificate of Service

On May 23, 2013, I caused a copy of this document to be filed with the Court through the ECF system, which provides electronic service of the filing to all counsel of record who have registered for ECF notification in this matter.

s/ Brian R. Markley
Attorney for The Dow Chemical Company

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Case No. 04-md-1616-JWL-JPO

DECLARATION OF WILLIAM H. WEIDEMAN

I, William H. Weideman, being over the age of eighteen, do hereby declare:

1. I serve as Executive Vice President and Chief Financial Officer of The Dow Chemical Company.

2. I have seen the Judgment in a Civil Case (Dkt. 2880) filed in *In re Urethane Antitrust Litigation*, Case No. 04-1616, pending in the United States District Court for the District of Kansas. I understand that Dow is appealing that judgment. If, however, the judgment stands after Dow's appellate efforts have been exhausted, Dow will be required to pay the judgment amount. According to the Judgment in a Civil Case, the judgment amount is currently \$1,200,147,117.00, plus interest. I have been told, however, that this figure does not account for the settlements by other companies, which should be offset against it. My statements herein about Dow's financial strength and ability to pay promptly assume the current judgment amount and would of course apply to a judgment amount reduced by settlement offsets.

3. Dow is one of the largest global chemical companies with annual sales of more than \$56 billion and cash flow from operating activities in excess of \$4 billion in 2012.

As is reflected in its 2012 Annual Report, Dow clearly has a strong liquidity position and sufficient financial flexibility to pay the judgment amount promptly. As of December 31, 2012,

Dow had more than \$9 billion in aggregate of readily available liquidity to cover on short notice not only the judgment amount but much larger amounts as necessary. This is comprised of cash and cash equivalents of \$4.3 billion on its balance sheet and access to committed and available facilities with various U.S. and foreign banks for an amount in excess of \$5.0 billion. The Court may obtain a true and accurate copy of Dow's 2012 Annual Report filed with the United States Securities and Exchange Commission from the following website: www.dow.com/investors/pdfs/161-00784_2012_Annual_Report.pdf.

4. Dow's current credit ratings are at a solid investment grade level (Baa2 by Moody's, BBB by S&P and BBB by Fitch). As demonstrated by several successful debt capital market transactions that Dow has recently completed, Dow has a proven track record and capacity to access debt capital markets globally to support any on-going financial needs and requirements.

5. Dow not only has the financial strength to pay the judgment amount, it can do so promptly. If the judgment is affirmed after all of Dow's appellate and certiorari rights have been exhausted, Dow will pay the judgment by wire transfer or check within 30 days.

6. Because of these circumstances, I understand that Dow's attorneys are asking the Court to stay execution on the judgment without requiring Dow to post a supersedeas bond. If Dow is required to purchase a bond to cover the current judgment, the cost would be approximately \$4.5 to 5 million per year according to quotes we have recently obtained.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'W. H. Weideman', written in a cursive style.

William H. Weideman
William H. Weideman