

No. 09-0264

In The Texas Supreme Court
Austin, Texas

IN RE ALLIED CHEMICAL CORPORATION ET AL.

ORIGINAL PROCEEDING FROM THE 332ND JUDICIAL DISTRICT COURT, HIDALGO COUNTY, TEXAS
CAUSE NO. C-4885-99-F
HONORABLE MARIO E. RAMIREZ, JR., PRESIDING

**RESPONSE OF CERTAIN RELATORS TO REAL PARTIES IN INTERESTS'
(1) MOTION TO ABATE AND (2) MOTION TO SEAL SUPPLEMENTAL APPENDIX
PLUS RELATORS' OPPOSED MOTION TO STAY**

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INTRODUCTION

This mandamus proceeding involves coercive efforts to force settlements in the absence of answers to the *Able Supply* and *Borg-Warner* Interrogatories. Now that an offer is on the table, some plaintiffs' counsel have "accepted," purportedly on behalf of all plaintiffs and intervenors, even those they do not represent and who have never even opposed this proceeding. Because this settlement offer is merely executory and particularly suspect to further manipulation by plaintiffs, defendants (1) request oral argument go forward and (2) seek a stay of the underlying cases. An abatement of the mandamus proceeding will not prevent further coercion and abuse.

RESPONSE TO MOTION TO SEAL

Plaintiffs/Real Parties in Interest filed a number of confidential documents with their motion to abate, together with a motion to seal this "supplemental appendix." Neither motion contained a certificate of conference. Defendants do not oppose the motion to seal.

DEFENDANTS' RESPONSE TO MOTION TO ABATE & DEFENDANTS' MOTION TO STAY

This cause was originally scheduled for oral submission on Tuesday, February 16, 2010. The Court has cancelled this submission date and indicated via email from the clerk's office a possible postponement until March or later. Defendants are willing and desirous of proceeding with argument at the Court's earliest convenience, and in the interim, defendants respectfully request that the underlying cases be stayed. The trial court should not be allowed to conduct any more contested proceedings, although it

should be allowed to enter an agreed, single, and final judgment disposing of all issues, claims, and parties pursuant to the proposed settlements (if ever accepted and effectuated). If the cases have in fact been settled, then plaintiffs would agree to a stay, which they have not yet done. Instead, plaintiffs seek to avoid the import of this mandamus proceeding by abating it.

As defendants advised the Court by letter on February 12, they have made a lump sum, aggregate settlement offer as to all plaintiffs in all cases. Plaintiffs' counsel for some (but not all) plaintiffs have indicated they will attempt to obtain actual acceptance from plaintiffs and intervenors. As indicated by the documents presented under seal, the proposed settlement is contingent on 100% acceptance and many other conditions.

It is unknown if the settlement offer can or will ever become final. First, counsel filing the motion to abate do not represent all plaintiffs and intervenors in this litigation, and their ability to secure acceptance from parties they do not represent (much less their own clients) is unknown. Second, as the documents tendered under seal demonstrate, the first settlement offers in the *Guadalupe Garza* case were made in November and December 2009 by the "trial/target defendants," but since that time, not a single settlement term has been satisfied. Not a single Medicare/Medicaid lien has been waived. Not a single dollar has been paid by the trial defendants.

The same outcome may be facing the remaining defendants in the three related cases. Moreover, no special master has apportioned the proceeds, and hence no ad litem has approved the proposed settlement for her clients, and no court has approved the proposed settlement either. At this time, there is simply an offer that can only be accepted

by performance. That performance might take months or even years. Or may never happen at all.

In that eventuality, the coercion to force additional and increased settlement payments can and will continue. As plaintiffs have indicated in their motion to abate, there will be a need to conduct basic discovery if one or more plaintiffs do not accept, followed by trial on the merits. Defendants, however, will settle only to buy their total peace, not to wait for another day to be abused. By stating that discovery would continue as to one or more plaintiffs, the plaintiffs' counsel disclose their intention to never answer the discovery posed to all plaintiffs. If the case is "settled," then a stay of trial court proceedings in all cases is therefore warranted, save and except for entry of a single, final and agreed judgment disposing of all issues, claims, and parties.

The *Acevedo* case (1800+ plaintiffs and intervenors), and its companion cases, *Guadalupe Garza* (single plaintiff) and *Elda Garza* (four plaintiffs), individually and collectively, represent classic examples of improper settlement coercion by the plaintiffs. The amicus parties correctly note that, absent this Court's involvement, the wide-spread coercion will only continue. While this Court and the court of appeals has repeatedly condemned that coercion, the plaintiffs have been willing to gamble that enforcement will never occur. A stay of all proceedings, however, will ensure that this Court's orders actually mean something.

CONCLUSION & PRAYER

Despite the assertion of some plaintiffs' counsel, there is no settlement in this case. Given the executory offer, Allied requests that the Court deny the motion to abate,

reschedule oral argument, grant this motion and stay the related cases, except for the entry of a single, final, agreed judgment disposing of all issues, claims, and parties. Allied requests all other relief to which it may be entitled.

Respectfully submitted,

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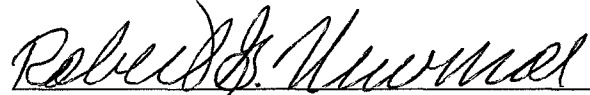
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CERTIFICATE OF CONFERENCE

The undersigned has conferred by email with lead trial and appellate counsel for the majority of the Real Parties in Interest about agreeing to the stay. Mr. Taylor has indicated that he would respond, but has not yet done so. It is anticipated that he will oppose the motion to stay on behalf of his clients.



Robert G. Newman

CERTIFICATE OF SERVICE

As indicated on the cover letter to this filing, I certify that on February 16, 2010, this motion was served via fax and/or email on the following:

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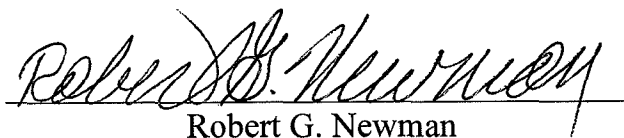
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