

Case No: 22-1750

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT DOW CORNING TRUST

Debtor

KOREAN CLAIMANTS

Interested Parties - Appellant

v.

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES;

CLAIMANTS' ADVISORY COMMITTEE

Interested Parties - Appellees

FINANCE COMMITTEE

Movant - Appellee

Brief of Appellant Korean Claimants

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TABLE OF CONTENTS

I. Statement in Support of Oral Argument	pages 4-5
II. Statement of Jurisdiction	pages 5-6
III. Statement of Issues	page 6
IV. Statement of Case	pages 6-10
V. Summary of Argument	pages 10-11
VI. Arguments	
A. Basis of Excusable Neglect	pages 11-14
B. The Danger of Prejudice to the Debtor	pages 15-17
C. The Length of the Delay and its Potential Impact on Judicial Proceedings	pages 17-18
D. The Reason for the Delay including Whether it was Within the Reasonable Control of the Korean Claimants	pages 19-22
E. Good Faith	page 22
F. Attorney's Mistake or Neglect	pages 22-23
VII. Conclusion	page 23
VIII. Appendix	

TABLE OF AUTHORITIES

	Pages
 Cases	
<i>In re Settlement Facility Dow Corning Trust</i> , 2008 U.S. Dist. Lexis 79328 (E.D.Mich. 2008).....	11
<i>In re Settlement Facility Dow Corning Trust</i> , 2009 U.S. Dist. Lexis 110233 (E.D.Mich. 2009).....	11
<i>In re Settlement Facility Dow Corning Trust</i> , 2012 U.S. Dist. Lexis 45331 (E.D.Mich.2012).....	11
<i>In re Settlement Facility Dow Corning Trust</i> , 2012 U.S. Dist. Lexis 45336 (E.D.Mich. 2012).....	11
 <i>Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P’Ship</i> , 507 U.S. 380,113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993).....	11,12,14
<i>In re Pioneer Inv. Servs. Co.</i> , 943 F. 2d 673(Sixth Cir. 1991).....	14
<i>Omni Mfg., Inc. v. Smith (In re Smith)</i> , 21 F.3d. 660, 666 (Fifth Cir. 1994).....	12
<i>In re City of Detroit</i> , 576 B.R. 552, 576 B.R. 552 (E.D.Mich. 2017).....	12,15
<i>Nafziger v. McDermott Int’l, Inc.</i> , 467 F. 3d. 514, 522 (Sixth Cir. 2006).....	14
<i>Williams v. State Farm Ins. Co.</i> , 2011 U.S. Dist. Lexis 174177 (E.D.Mich. 2011).....	14
 Other Authorities	
Fed. R. Civ. P. 6(b)(1).....	15
Fed. R. Bankr. P. 3003(c)(3).....	10,22
Fed. R. Bankr. P. 9006(b)(1).....	10,13,22

I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Korean Claimants filed Motion for Extension of Deadline for Filing Claim on February 3, 2021. Dow Silicones Corporation and Debtor's Representatives and the Claimants' Advisory Committee filed Response to deny the Korean Claimants' Motion on February 17, 2021. The Finance Committee filed the Joinder in the Response of Dow Silicones Corporation and Debtor's Representatives and the Claimants' Advisory Committee on February 17, 2021.

The Korean Claimants filed Reply to Response of Dow Silicones Corporation, the Debtor's Representatives, the Claimants' Advisory Committee and the Finance Committee (hereinafter referred to as "the Appellees" collectively) on February 23, 2021.

The Korean Claimants filed Motion for Expedited Hearing and Relief on July 3, 2022. Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee filed Response to deny the Korean Claimants' Motion on July 18, 2022. The Finance Committee filed the Joinder in the Response of Dow Silicones Corporation and Debtor's Representatives and the Claimants' Advisory Committee on July 19, 2022.

The Korean Claimants filed Reply to the Response of the Appellees on July 20, 2022.

The District Court issued Memorandum Opinion and Order regarding Two Orders to Show Cause against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants on August 12, 2022. The District Court in this Order ruled that the Korean Claimants' Motion for Extension of Deadline for Filing Claim (ECF No. 1586) is denied.

The Korean Claimants appealed on August 15, 2022. The Korean Claimants did not have a chance to be heard for the Motion for Extension of Deadline for Filing Claim. Therefore, the Korean Claimants request this Court to provide an oral argument.

II. STATEMENT OF JURISDICTION

The United States District Court Eastern District of Michigan has jurisdiction over the Amended Joint Plan of Reorganization of Dow Corning Corporation effective on June 1, 2004 ("the Plan") to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents including the SFA.

On June August 12, 2022, the District Court issued Memorandum Opinion and Order regarding Motion for Extension of Filing Claim. The Korean Claimants filed this appeal in a timely manner. The Order of the District Court is the final order which cannot be contested in the District Court. Therefore, the United States Court of Appeals for the Sixth Circuit has jurisdiction over this appeal.

III. STATEMENT OF ISSUES

The issue is whether the four hundred five (405) Korean Claimants who filed their respective submission including Proof of Manufacturer and Claim for Disease payment with diagnosis of doctors with the Settlement Facility on December 20, 2021 are eligible for processing of the Claims by the Settlement Facility.

The issue is whether the 405 Korean Claimants' filing which passed June 3, 2019, the date of deadline for claim-filing set by Closing Order 1, was made by the excusable neglect.

IV. STATEMENT OF CASE

The Finance Committee filed Motion for Entry of an Order to Show Cause with respect to Yeon-Ho Kim on the basis that Yeon-Ho Kim did not distribute the funds to the 88 Claimants on January 10, 2018. (RE1352 Pg ID:#21662-

21733)

The Korean Claimants filed Cross Motion for Entry of an Order to Show Cause with respect to the Finance Committee on the basis that the Finance Committee entered into a settlement agreement with the Korean Claimants as a group but it did not respect the agreement and did not compensate for the costs incurred due to its proposal for settlement on January 17, 2018. (RE1357 Pg ID:#22101-22015)

The District Court granted the Finance Committee's Motion and ordered Yeon-Ho Kim to appear in the Court on March 22, 2018 on January 26, 2018.(RE1368 Pg ID:#22153)

The Korean Claimants filed Motion for holding a joint hearing with the Korean Claimants' Motion for Recognition and Enforcement of Settlement Agreement Filed on January 31, 2018. Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee filed Opposition to Yeon-Ho Kim's Cross Motion for Entry of an Order to Show Cause with respect to the Finance Committee on January 31, 2018. (RE1372 Pg ID:#22252-22258)

The Korean Claimants filed Motion for Exclusion of Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee from the Korean Claimants' Cross Motion for Entry of an Order to Show Cause with respect to the Finance Committee on February 3, 2018.

In addition to Motion for Entry of an Order to Show Cause with respect to Yeon-Ho Kim, the Finance Committee filed Motion for Entry of an Order to Show Cause with respect to Yeon-Ho Kim's excessive attorney's fees on the basis that Yeon-Ho Kim took 38% of the amount of check for a Korean Claimant, SID No.2783411, who resided in the US and that her sister impersonated her to file her claim with the Settlement Facility on March 7, 2018. (RE1387 Pg ID:#22657-22854)

The District Court granted the Finance Committee's Motions and ordered Yeon-Ho Kim with respect to excessive attorney's fees to appear in the Court on March 22, 2018 on March 9, 2018. (RE1388 Pg ID:#22855)

The Finance Committee submitted the District Court unsubstantiated Declarations. (RE1358-1 Pg ID:#22023-22025, RE1391 Pg ID:#23290-23293)

The Finance Committee has prosecuted Yeon-Ho Kim for sanctions while the Motion for Recognition and Enforcement of Settlement Agreement filed by the Korean Claimant was pending.

The District Court issued Order denying the Motion for Recognition and Enforcement of Settlement Agreement Filed by the Korea Claimants on December 12, 2018. (RE1461 Pg ID:#24002-24017)

The Korean Claimants appealed. This Court issued Opinion affirming the

District Court's denial on June 1, 2020.

The District Court issued Closing Order 1 for Final June 3, 2019 Claim Deadline on July 25, 2018. (RE1447 Pg ID:#23937-23950)

The four hundred five (405) Korean Claimants filed Motion for Extension of Deadline for Filing Claim with the District Court on February 3, 2021. (RE1586 Pg ID:#27065-27348)

The 405 Korean Claimants filed their respective submission including Proof of Manufacturer and Claim for disease payment with diagnosis of doctors with the Settlement Facility on December 20, 2021.

The Appellees filed Response to the Motion for Extension of Deadline for Filing Claim on February 17, 2021. (RE1592 Pg ID:#27382-27807)

The Korean Claimants filed Reply to the Response of the Appellees on February 23, 2021. (RE1594 Pg ID:#27808-27838)

The Settlement Facility denied processing of the Korean Claimants' Claim on the basis of Closing Order 1 and Closing Order 2 on March 10, 2022. (RE1644-2 Pg ID:#28823-28846)

The 405 Korean Claimants filed Motion for Expedited Hearing and Relief on

July 3, 2022. (RE1644 Pg ID:#28817-28857)

The Appellees filed Response to the Motion for Expedited Hearing and Relief on July 18, 2022. (RE1645 Pg ID:#28858-29324)

The Korean Claimants filed Reply to the Response of the Appellees on July 20, 2022. (RE1647 Pg ID:#29325-29341)

The District Court issued Memorandum Opinion and Order regarding Two Orders to Show Cause against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants on August 12, 2022. (RE1652 Pg ID:#29349-29375). The District Court denied Motion for Extension of Deadline for Filing Claim. The Korean Claimants appealed.

V. SUMMARY OF ARGUMENT

The 405 Korean Claimants argue that the deadline for filing Claim should be extended because the Korean Claimants had excusable neglect under Fed. R. Bankr. P. 3003(a) and Fed. R. Bankr. P. 9006(b)(1).

The 405 Korean Claimants argue that the District Court failed to address whether the Korean Claimants had excusable neglect and simply ruled that the Plan specified that Claim for disease payment shall be filed by the Deadline, June 3, 2019.

The Korean Claimants have demonstrated the basis of four factors for excusable neglect.

VI. ARGUMENT

A. Basis of excusable neglect

The Standard of review for argument is an abuse of discretion.

The District Court did not address the issue of whether the 405 Korean Claimants had "excusable neglect.", although it addressed in other cases. (*See In re Settlement Facility Dow Corning Trust*, 2008 U.S. Dist. Lexis 79328 (E.D.Mich. 2008), *In re Settlement Facility Dow Corning Trust*, 2009 U.S. Dist. Lexis 110233 (E.D.Mich. 2009), *In re Settlement Facility Dow Corning Trust*, 2012 U.S. Dist. Lexis 45331, *In re Settlement Facility Dow Corning Trust*, 2012 U.S. Dist. Lexis 45336 (E.D.Mich. 2012))

""The Supreme Court held that "[t]he 'excusable neglect' standard of Rule 9006(b)(1) governs late filing of proofs of claim in Chapter 11 cases" *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S.Ct. 1489,

123 L.Ed. 2d 74 (1993) at 389. *See also Omni Mfg., Inc. v. Smith (In re Smith)*, 21 F.3d. 660, 666 (Fifth Cir. 1994) (citing *Pioneer*, and holding that Rules 3003(c)(3) and 9006(b)(1) "must be read together," and require a showing of "excusable neglect" in order for the court to allow a late-filed claim in a Chapter 11 case)."" ((*See In re City of Detroit*, 576 B.R. 552, 576 B.R. 552 (E.D.Mich. 2017) at 559))

""The Supreme Court's decision in *Pioneer* is the leading case on what 'excusable neglect' means. *Pioneer* discussed both what "neglect" means, and how courts should determine whether neglect is "excusable." As this Court has noticed previously, in another case:

In *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993), the Supreme Court explained that "[t]he ordinary meaning of 'neglect' is 'to give little attention or respect' o a matter, or ... 'to leave undone or unattended to esp[ecially] through carelessness." *Id.* (quoting Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). Based on the ordinary meaning of "neglect," the Court concluded that the concept of "neglect"... denotes that "a party is partly to blame" for failing to do act, and that "... 'excusable neglect' is understood to encompass situations in

which the failure to comply with a filing deadline is attributable to negligence ." *Id.* at 394 (internal quotation marks and citations omitted).

If [movant] shows "neglect," the next issue is whether [the movant's] neglect was excusable. In *Pioneer*, the Supreme Court explained that a determination of

whether a party's neglect of a deadline is excusable ... is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission ... [including] the danger of prejudice to the [party opposing relief], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.'" *Id.* at 560

To sum up, the Supreme Court explained that a movant must demonstrate the following factors if a court determines that the movant is permitted to act to be done where the failure to act was the result of excusable neglect under Rule 9006(b)(1):

- (1) whether granting the delay will prejudice the debtor;
- (2) the length of the delay and its impact on efficient court administration;
- (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;
- (4) whether the creditor acted in good faith; and
- (5) whether clients should be penalized for their counsel's mistake or neglect. *See In re Pioneer Inv. Servs. Co.*, 943 F. 2d 673 (Sixth Cir. 1991) at 678

When a court determines whether a movant has "excusable neglect," it has applied a balancing test.

"In determining whether excusable neglect has been shown, courts are generally urged to apply a five-factor balancing test which consists of the following : (1) the danger of prejudice to the non-moving party ; (2) the length of the delay and the potential impact upon the judicial proceedings ; (3) the reason for the delay ; (4) whether the delay was within the reasonable control of the moving party ; and (5) whether the moving party acted in good faith. *Nafziger v. McDermott Int'l, Inc.*, 467 F. 3d. 514, 522 (Sixth Cir. 2006) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993))" (*See Williams v. State Farm Ins. Co.*, 2011 U.S. Dist. Lexis 174177 (E.D.Mich. 2011) at 6

B. The danger of Prejudice to the debtor

"After a plan is confirmed, the Debtor relies on the firmness of the claim-filing deadline in implementing and administrating the confirmed plan. Enforcing such a claims-filing deadline is necessary because without enforcement the deadline does not fully serve its purposes and can become meaningless ... Allowing creditors to casually ignore the deadline for filing proofs of claim would run risk of creating chaos in such a large case and undermining the confidence of all parties in interest. In addition, allowing creditors to ignore the claims-filing deadline would create needless delays in the post-confirmation phase of the case by lengthening the time it takes for the Debtor to fully implement and administer the confirmed plan and get the case closed. Such delay would inevitably increase the cost of the case to the Debtor and could delay interim and final distribution to creditors under the confirmed plan." (*See In re City of Detroit* at 361)

However, the danger of prejudice to the Debtor explained as above is not applicable to the Appellant.

Even if the Settlement Facility extends the Deadline for filing claim of the certain (405) Korean Claimants there is no danger of prejudice to the Debtor.

The 405 Korean Claimants submitted the POM and the diagnosis of doctors for disease payment to the Settlement Facility on December 20, 2021. But the

Settlement Facility has already finished the review of the files of the Korean Claimants. The Korean files use an identical affirmative statement of implanting physician to prove a Dow Corning's product and the same doctor's diagnosis to prove a disease claim. The remaining work to do on the part of the Settlement Facility is just to receive a Court's opinion whether the 405 Korean Claimants are eligible claimants even if they passed the deadline for filing.

The Funds for payments that were paid by the Debtor are fixed and turned out sufficient to pay to all of the Claimants with the SID number even after the Settlement Facility paid out the pending claims in full. There is no additional obligation that the Debtor has to execute for the Funds even if the 405 Korean Claimants are allowed to be processed by the Settlement Facility. In addition, the Debtor has no right to reclaim the Funds if the Funds remains after the Settlement Facility closed.

Because the Settlement Facility will operate until 2023 or the early 2024, the processing of the 405 Korean Claimants would not hinder to get the Settlement Facility closed as the schedule.

The Settlement Facility has been holding the files of the 405 Korean Claimants since they submitted a proof of claim on 1994 or 2003 (for late claim) to the Settlement Facility. The 405 Korean Claimants have just submitted a proof of manufacturer and a diagnosis of doctor to prove a disease. The Settlement Facility has kept the files of the Korean Claimants so the only thing for the

Settlement Facility to do is to begin the processing of claim to find whether they are acceptable. The Staffs of the Settlement Facility are ready and professional so that there would be no time-consuming to conduct examination of the Korean files because the Korean files use an identical affirmative statement of implanting physician to prove a Dow Corning's product and the same doctor's diagnosis to prove a disease claim. The Staffs of the Settlement Facility are familiar with the Korean files too. Therefore the 405 Korean Claimants' late-filing would not hinder the operation and processing of claims (which is has been already finished according to the Declaration) of the Settlement Facility.

C. The length of the delay and its potential impact on judicial proceedings

The four hundred five (405) Korean Claimants who had already filed the Motion for Extension of Deadline of Filing Claim with the District Court on February 3, 2021 filed their claim for proof of manufacturer and for disease payment on December 20, 2021 with the Settlement Facility. The Korean Claimants delayed filing from June 3, 2019 to December 20, 2021.

The Korean Claimants requested for the extension of filing claim on February 3, 2021 to the Settlement Facility.

This length of delay is not significant in comparison with the length of life of the Settlement Facility which ranges from 2004 to 2023 or early 2024.

The 405 Claimants had to prepare the documents for submission to their representing attorney for considerable time and the representing attorney had to spend considerable time to finish up the submitted documents to meet the requirements for Claims to the Settlement Facility. In particular, this large group of Claimants demanded a lot of preparation periods and detailed information for actual documentation respectively to conduct the final submission to the Settlement Facility.

The length of delay would not cause a potential impact on judicial proceedings.

The Settlement Facility has already conducted review of the files of the 405 Korean Claimants. The staffs of the Settlement Facility are professional and familiar with the files of the Korean Claimants so that there would be no time-consuming to carry out processing the Claims.

In addition, the Korean Claimants, before filing the late-claims, notified the Debtor in the Motion for Vacating the Decision of the Settlement Facility regarding Address Update/Confirmation pending appeal that there were over five hundred (500) Claimants who were going to file Claim with the Settlement Facility. Both the Debtor and the Settlement Facility have been aware that the 405 Korean Claimants would file their Claim with the Settlement Facility.

The late-claim by the 405 Korean Claimants to the Settlement Facility should not be a potential impact on judicial proceedings.

D. The reason for the delay including whether it was within the reasonable control of the Korean Claimants

First of all, the Korean Claimants have been engaged in several Motions in the District Court and in this Court, some of Motions pending appeal.

In particular, the District Court issued Order denying Motion for Recognition and Enforcement of Settlement Agreement Filed by the Korea Claimants on December 12, 2018.

The Korean Claimants have been in notion that the Finance Committee overseeing the Settlement Facility had offered a mediation for settlement in full with the Korean Claimants as a group and had entered into a settlement agreement. The Korean Claimants knew that the settlement agreement was not in force because Dow Corning Corporation objected to it. Therefore the 405 Korean Claimants had legitimate reason for filing Motion for Recognition and Enforcement of Settlement Agreement with the District Court so they did not file their Claim individually with the Settlement Facility by June 3, 2019.

The Korean Claimants filed Motion for Recognition and Enforcement of Settlement Agreement with the District Court and waited for the result of the Motion before filing proof of manufacturer and doctor's diagnosis for disease payment with the Settlement Facility.

After the District Court dismissed the Korean Claimants' Motion for Recognition and Enforcement of Settlement Agreement, the Korean Claimants filed notice of appeal. This Court issued Opinion affirming the District Court's denial on June 1, 2020.

Therefore the 405 Korean Claimants did not prepare the documents for Claims until June 1, 2020, the date of issuance of this Court's Opinion regarding the Settlement Agreement.

Since then, the 405 Claimants had to prepare the documents for submission to their representing attorney for considerable time and the representing attorney had to spend considerable time to finish up the submitted documents to meet the requirements for Claims to the Settlement Facility. In particular, this large group of Claimants demanded a lot of preparation periods and detailed information for actual documentation respectively to conduct the final submission to the Settlement Facility.

The attorney filed Motion for Extension of Deadline for Filing Claim with the District Court on February 3, 2021. The 405 Korean Claimants filed their Claims with the Settlement Facility on December 20, 2021.

Above of all, they believed through advice of the representing attorney that the Closing Order 1 of July 25, 2018, fixing and explaining the Deadlines for Filing Claims under the Plan, has not been notified nor heard in advance before

entering so that the final Deadline of June 4, 2019 was to be somehow extended by the Motion.

The attorney has been challenging that Closing Orders of the District Court including Closing Order 1 were ineffective due to lack of notice and hearing before issuance. Therefore the Korean Claimants did not respect Closing Order 1.

Second, the mailings of the Settlement Facility notifying the Korean Claimants the deadline of June 3, 2019 were not delivered on time. In addition, there were many mailings of the Settlement Facility, which have never arrived in Korea. The records about how many mailings of the Settlement Facility were returned as undeliverable are kept only at the Settlement Facility (which was not shared with counsel) and nobody knew why those mailings were returned as undeliverable. Furthermore there were many cases that the Settlement Facility mailed to wrong address where the Claimants did not live.

During the time of period around June 3, 2019 in particular, the mailings of US Postal Service that the Settlement Facility used for the Korean Claimants took at least three to seven months to arrive to both the Claimants and the attorney.

Third, the 405 Korean Claimants who failed to file their Claim with the Settlement Facility by June 3, 2019 were affected by COVID-19 pandemic and quarantine measures enforced by the Korean Government. Most clinics

including implanting physicians who were responsible for issuing affirmative statement for proof of manufacturer and diagnosis doctors were closed.

Since the mailings of the Settlement Facility of 2019 including the final notice for June 3, 2019 were delivered to the Korean Claimants several months late, the COVID-19 pandemic situation which has started from the last half of 2019 in Korea following rumors that the pandemic took place in Wuhan City of China affected the Korean Claimants who did not know what would happen in the Settlement Facility regarding their case for breast implant compensation.

With respect to COVID-19 pandemic, it should have been that the Settlement Facility) voluntarily extends the deadline for filing a disease claim in discretion just as the Claims Administrator did for an expedited payment of disease claim.

E. Good Faith

The 405 Korean Claimants did not pass the deadline of June 3, 2019 in bad faith.

F. Attorney's mistake or neglect

There is none of mistake or neglect on the part of the attorney of the 405 Korean Claimants' failure to file claim by June 3, 2019. The counsel protested the Deadline for filing Claim to the Settlement Facility and even filed Motions

contending that the Deadline shall not be applied to the Korean Claimants. The counsel was in the middle of processing Motion for Recognition and Enforcement of Settlement Agreement. The counsel also filed Motion to vacate Closing Order 2 of March 19, 2019 with the District Court, which is pending appeal. Accordingly, there was no attorney's mistake or neglect.

The 405 Korean Claimants demonstrated the factors of “excusable neglect” specified in the *Pioneer* case under Fed. R. Bankr. P. 3003(c)(3) and 9006(b)(1).

Even if the 405 Korean Claimants relied on the circumstances in error that the Korean Claimants contended in the Motions filed with the District Court, the factors of *Pioneer* should be considered in favor of the Korean Claimants with the balance test.

VII. Conclusion

For the forgoing reason, the certain four hundred (405) Korean Claimants request this Court to OVERTURN the District Court's Memorandum and Opinion and Order regarding Two Orders to Show Causes against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants and GRANT the Motion for Extension of Deadline of Claims of the certain (405) Korean Claimants.

Date: September 26, 2022

Respectfully submitted,



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APPENDIX

- RE.1352 Motion for Entry of an Order to Show Cause with respect to
Yeon-Ho Kim Page ID:#21662-21733
- RE.1357 Cross Motion for Entry of an Order to Show Cause with respect
to the Finance Committee Page ID:#22102-22015
- RE.1368 Order to Show Cause Page ID:#22153
- RE.1372 Opposition of Dow Corning Corporation, the Debtor's
Representatives and the Claimants' Advisory Committee to Yeon-
Ho Kim's Cross Motion for Entry of an Order
Page ID:#22252-22258
- RE.1387 Motion for Entry of an Order to Show Cause with respect to
Yeon-Ho Kim's Excessive Attorney's Fees
Page ID:#22657-22854
- RE.1388 Order to Show Cause Page ID:#22855
- RE.1358-1 Declaration Page ID:#22023-22025
- RE.1391 Declaration Page ID:#23290-23293
- RE.1461 Order denying Motion for Recognition and Enforcement of
Mediation filed by the Korean Claimants Page ID:#24002-24017
- RE.1447 Closing Order 1 Page ID:#23937-23950
- RE.1586 Motion for Extension of Deadline for Filing Claim
Page ID:#27065-27348
- RE.1592 Response to Motion for Extension of Deadline for Filing Claim
Page ID:#27382-27807

RE.1594	Reply to the Response	Page ID:#27808-27838
RE.1644-2	Letter of the Settlement Facility	Page ID:#28823-28846
RE.1644	Motion for Expedited Hearing and Relief	Page ID:#28817-28857
RE.1645	Response to Motion for Expedited Hearing and Relief	Page ID:#28858-29324
RE.1647	Reply to the Response	Page ID:#29305-29341
RE.1652	Opinion and Memorandum regarding Two Orders to Show Cause against Yeon-Ho Kim and Various Motions Filed by the Korean Claimants	Page ID:#29349-29375

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2022, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

A handwritten signature in black ink, appearing to read 'Yeon-Ho Kim', with a long horizontal flourish extending to the right.

Date: September 26, 2022

Signed by Yeon-Ho Kim

Form 6. Certificate of Compliance With Type-Volume Limit

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/s/ Yeon Ho Kim

Attorney for Korean Claimants

Dated: September 26, 2022